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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 WILG DEPARTMENT OF LABOR & INDUSTRIES AND CITY OF EVERETT

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I. INTRODUCTION

Amicus Workers' Injury Law & Advocacy Group (WILG) asks this Court to rule that res judicata may not be applied in a way that works an injustice. L&I and the City agree that res judicata has a justice component, but one that is narrower than that found for collateral estoppel. In any event, applying an injustice prong to the res judicata test does not change the result here. There is no manifest injustice in applying finality here.

II. ARGUMENT

A. The Courts Do Not Apply Res Judicata If It Works an Injustice

There is a full and robust body of case law on res judicata, and WILG shows no reason to reexamine the fundamental principles now. WILG cites a long string of out-of-state cases under the mistaken notion that this State's courts have never considered the issue of injustice in the context of res judicata. WILG Br. 6-9. But Washington courts have long acknowledged that res judicata is not applied if it defeats the ends of justice. *E.g.*, *Luisi Truck Lines, Inc. v. Wash. Util. & Transp. Comm'n*, 72 Wn.2d 887, 897, 435 P.2d 654 (1967). But, while courts consider manifest injustice under the res judicata analysis, the consideration of injustice is narrower than under the collateral estoppel analysis. *Dep't of Ecology v.*

Acquavella, 112 Wn. App. 729, 744 n.7, 51 P.3d 800 (2002). The courts recognize that the effect of res judicata is broad and subject to few exceptions.[1] As *Kingery* explains, "An unappealed Department [of Labor and Industries] order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order . . . ." *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997).

Here, both actions involve the same parties and same claim: the same occupational exposure, the same medical condition, and the same request for relief, with the same cause of action at the Board—an action seeking reversal of L&I's order denying allowance. In this situation, res judicata bars relitigation both of what was litigated and of what could have been litigated. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). In contrast, collateral estoppel only applies to issues that were actually litigated in the prior case. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Collateral estoppel's scope is narrower than that of res judicata, because collateral estoppel does

[1] WILG points to *Department of Labor & Industries v. Fields Corp.*, 112 Wn. App. 450, 45 P.3d 1121 (2002), as noting there are other equitable exceptions to applying res judicata. WILG Br. 6. This is true. "The equitable exceptions that have been allowed by this state's courts are limited" regarding finality, and such exceptions have been found only when 1) the party was diligent in pursuing his or her rights and when 2) the party was incompetent or otherwise unable to understand a Department order or the appeals process, or 3) where circumstances outside the party's control rendered it impossible to file a timely appeal. *See Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 443-44, 262 P.3d 837 (2011). Weaver has not alleged these sorts of circumstances.

not contemplate that the parties, cause of action, and relief sought are all identical. But far from being unfair, it is fair that res judicata would be more sweeping in its effect because it involves cases that are more closely identical. Thus, when justice is examined in the res judicata context it is narrower than collateral estoppel. *Acquavella*, 112 Wn. App. at 744 n. 7.

B. No Public Policy or Procedural Fairness Reason Exists to Discard Res Judicata Here

Courts have recognized justice exceptions to res judicata based on fundamental public policy concerns or procedural unfairness. *See Acquavella*, 112 Wn. App. at 744. Here, there is no public policy reason why Weaver's first case should not have res judicata effect. For decades, the courts have recognized the appropriateness of applying preclusion in the workers' compensation arena. *Kingery*, 132 Wn.2d at 169; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 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). In fact, public policy points to applying res judicata in a situation where two cases involve the same occupational exposure, the same medical condition, and the same request for relief. It would be unfair to the City of Everett to bring it into court to relitigate a matter it already

litigated, just as it would be unfair to require a worker to relitigate a finding that an injury was work-related if circumstances changed and the impact on the employer significantly increased.

And Weaver has demonstrated no procedural unfairness. When considering injustice in the context of collateral estoppel, the Court looks to the procedural fairness in the first case. *See Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999). The "injustice element is rooted in procedural unfairness. Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." *Schibel v. Eymann*, 189 Wn.2d 93, 102, 399 P.3d 1129 (2017) (quotations omitted). Here, Weaver received a full hearing in the first case, calling five witnesses, cross-examining the employer's witnesses, submitting exhibits, and providing briefing. AR 252-64, 296, 328; RCW 51.52.140.

Additionally, Weaver could have raised his arguments at the time of the first claim. The only issue on appeal at the time of the first claim was whether he had an occupational disease, and he could have and did present evidence on that topic. His later worsened condition had no bearing on the threshold question of whether he had an occupational disease. Because he could have and did fully litigate the issue at the time of the first claim, it is fair to apply res judicata.

Nothing prevented Weaver from offering even more evidence in his first case if he had wished to do so. Weaver may be dissatisfied with the result of the first case but there was no procedural unfairness, and it is just to apply res judicata.

C. *Hadley* Does Not Apply to Res Judicata

Although the courts consider whether application of res judicata causes an injustice, they do not abandon core elements of the res judicata test when doing so. For this reason, this Court should reject WILG's attempt to graft *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001), onto the res judicata jurisprudence. WILG Br. 4.

In *Hadley*, there were two proceedings: a traffic infraction proceeding and a tort action. 144 Wn.2d at 308. The plaintiffs sought to apply collateral estoppel from the first proceeding to ensnare the defendant with tort liability in the second case. *Id.* at 309. The Court denied that application because the amount in the first proceeding was potentially so nominal ($95) that there would not be an incentive to litigate fully the first matter. *Id.* at 309, 315. But this is a different factual scenario than res judicata because in *Hadley* there were two entirely different proceedings with different parties and different causes of action. Res judicata, on the other hand, applies when there is the same parties and same causes of actions. So the courts have always held that res judicata prohibits the relitigation of claims and issues that were litigated, or could have been

litigated, in a prior action. *Loveridge*, 125 Wn.2d at 763. In the res judicata context, since it is the same cause of action, the party "could have" fully litigated the matter, whether the amount was small or large.

Application of *Hadley* to res judicata would mean that a person who thought he or she had a small value tort claim could then refile his or her claim if the person believed the damages had increased. But this would render an injustice to the defendant in both matters. And res judicata is an equitable doctrine designed to bring repose and finality to litigation. *Pederson v. Potter*, 103 Wn. App. 62, 71, 11 P.3d 833 (2000). So it would work an injustice to *not* apply res judicata in this situation and in this case where Weaver had the opportunity and did in fact fully litigate the threshold question of whether he had a valid and compensable workers' compensation claim.

III. CONCLUSION

The trial court properly applied res judicata in this case to prevent re-litigation of matters that were and that could have been litigated in the first claim. Res judicata takes into account whether its application would result in a manifest injustice, but Weaver had his day in court and it does not work an injustice to apply res judicata to him.

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RESPECTFULLY SUBMITTED this 6th day of February 2019.

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SUPREME COURT OF THE STATE OF WASHINGTON

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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 WILG and this Certificate of Service in the below described manner:

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