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NO. 68825-1-I

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

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LEE RICHARDSON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

Scott T. Middleton  
Assistant Attorney General  
WSBA No. 37920  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 587-5159

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## I. INTRODUCTION

This is a case arising from Lee Richardson's industrial insurance claim, including distribution of her third party settlements. The Industrial Insurance Act, Title 51, provides the exclusive remedy for her injury and benefits. While injured workers are generally barred from suing for their workplace injuries, RCW 51.24.030 allowed Ms. Richardson to sue the third parties responsible for her injury. This right to sue is subject to the Department of Labor and Industries' right to obtain a share of the damages recovered. RCW 51.24.060. When a worker recovers funds from a third party, as Ms. Richardson did in this case, a certain amount of the recovery may also be subject to an offset against payment of future benefits. *See* RCW 51.24.060(1)(e). This offset amount must be exhausted before the Department will resume payments. Ms. Richardson's offset is exhausted.

Ms. Richardson appeals from an April 27, 2012 superior court order granting summary judgment to the Department. Ms. Richardson asserts in this action, as she did or could have done in prior actions, that the Department applied an improper "offset formula" to her third party recoveries and that, if the proper "formula" had been applied, she "would not now be denied ongoing payment of benefits and medical treatment." App. Br. at 8. She seeks a writ of mandamus "that L&I apply the proper

formulas and continue her *current* benefits, and declaratory relief to enjoin L&I from refusing those benefits.” (emphasis in original). App. Br. at 9.

Although Ms. Richardson contends she “was not seeking to re-litigate prior administrative appeals or hearings . . . .” App. Br. at 1, she devotes the majority of her opening brief to addressing claims and issues that have previously been decided by final judgments and are barred by res judicata. The issues regarding the amount of the third party settlements she should receive and the application of the offset have been resolved by final and binding orders of the Board and the superior court.

Ms. Richardson also requests restoration of her workers’ compensation benefits. She is not presently receiving time loss benefits because she refused to participate in an independent medical examination, as required by RCW 51.32.110. The suspension was upheld by final order of the Board. Her claims manager stated her benefits would likely be restored if she would simply attend an independent medical examination.

The superior court properly dismissed Ms. Richardson’s claims and this Court should affirm.

## **II. STATEMENT OF THE ISSUES**

- A. Does res judicata bar Ms. Richardson’s claim for a writ of mandamus when claims and issues arising from her third party recoveries were litigated or should have been litigated in prior actions that resulted in final judgments?

- B. Did the superior court properly dismiss Ms. Richardson's claims for mandamus, declaratory and/or injunctive relief when the Department has fulfilled its obligations and there were other remedies available to her to contest the Department orders?
- C. Did the superior court properly deny Ms. Richardson's request for declaratory and/or injunctive relief related to her industrial insurance claim when the Department and the Board did not first have an opportunity to pass on any benefits issue under the claim?
- E. Did Ms. Richardson waive her right to challenge the superior court's dismissal of her breach of contract claim under RAP 10.3(a)(6) and RAP 10.4 when her brief fails to cite any legal authorities or present argument regarding breach of contract?

### III. STATEMENT OF THE CASE

#### A. **The Department Allowed Ms. Richardson's Industrial Injury And Has Paid Benefits On Her Behalf**

Ms. Richardson was injured in the course of her employment on August 17, 1995. CP 84. She filed a claim for industrial insurance benefits on August 31, 1995. CP 84. The Department allowed the claim and, on September 6, 1995, began paying benefits on her behalf. CP 84.

#### B. **The Amount Ms. Richardson Was To Receive From Her Third Party Settlements Has Already Been Determined**

Ms. Richardson filed third party actions against Red Lion for her initial injury, and her physician for medical malpractice. CP 84. She recovered \$1,000,000 in her malpractice action on October 11, 2001, and \$373,000 against Red Lion on November 21, 2001. CP 84. On October 10, 2001, the Department and Ms. Richardson executed a compromise

agreement indicating how the \$1,000,000 recovery would be distributed as between them. CP 161. Richard Vlosich, the Department representative who attended the October 2001 mediation, explained to Ms. Richardson and her counsel how the funds would be distributed. *See* CP 165-67.

**1. The Superior Court Has Already Determined The Amount Ms. Richardson Was Entitled To Receive From Her Third Party Settlements**

On October 29, 2001, the Department issued an order that distributed Ms. Richardson's \$1,000,000 recovery as follows:

Claimant has recovered \$1,000,000 and requires distribution proceeds as follows: (1) Net share to attorney for fees and costs -- \$421,742.47; (2) Net share to claimant -- \$364,686.29; and (3) Net share to Department -- \$213,571.24. The Department has paid benefits of \$372,037.72 and asserts \$369,362.91 against this recovery. Demand is made upon the claimant to reimburse the Department in the amount of \$213,571.24. As the claimant is still pursuing recovery against other parties, the Department retains its right of reimbursement against any further recovery under RCW 51.24.030 for the benefits paid as a result of this injury. The Department shall issue any further order based on the entire recovery, fees and costs, and benefits paid. The Department has deducted from its total reimbursement share the money it receives by this order. It is ordered that no benefits or compensation will be paid to or on behalf of claimant or beneficiary as defined by RCW 51.08.020 until such time the excess recovery totaling \$127,296.39 has been expended by claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim.

CP 84-85.<sup>1</sup>

Ms. Richardson protested the order. CP 260. She asserted, “I was promised as a condition of mediation settlement that all medical coverage including prescriptions and surgeries, would continue to be paid until further completion of this cause/claim with Red Lion Hotels and settlement had taken place.” CP 132. She also took issue with the amount of attorney fees and costs the Department contributed towards her third party recovery and she argued that the distribution order did not accurately reflect the October 2001 agreement. CP 132-33. On April 25, 2002, after reconsideration, the Department affirmed the October 29, 2001 order. CP 260.

Ms. Richardson appealed the April 25, 2002 order. CP 260. On May 1, 2002, the Department issued an order distributing the \$373,000 recovery from Red Lion as follows:

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<sup>1</sup> Ms. Richardson asserts in her brief, App. Br. at 4, that this order conflicts with the terms of the compromise agreement between the Department and Ms. Richardson. That agreement, in relevant part, provides that the \$1,000,000 settlement would be run through the “formula” and that the Department would pay a share of the attorney fee and Department-approved costs. CP 161. Mr. Vlosich clarified by declaration that he advised Ms. Richardson that the Department would only pay fees and costs on its share of the settlement. CP 166. The Department agreed to continue to pay for Department-approved medical bills until she received her settlement with Red Lion. Only time loss was to be deducted from her offset. CP 161. While there was a systematic issue with applying only time loss benefits to the offset, CP 89, the Department later agreed to assert no lien against the Red Lion settlement. It did just that. In any event, these issues were resolved by final order of the Board and superior court. *See* discussion *infra* in Section III.B.1.

Claimant has recovered \$373,000 and requires distribution of the settlement proceeds as follows: 1) Net share to attorney for fees and costs - \$138,000; 2) Net share to claimant - \$234,990.78; and 3) Net share to Department - \$0. The Department has paid additional benefits of \$6,581.14 and asserts \$0 against the recovery. The lien against this recovery has been satisfied. It is ordered that no benefits or compensation will be paid to or on behalf of claimant or beneficiary as defined by RCW 51.08.020 until such time the excess recovery totaling \$104,376.29 has been expended by claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim. Total excess amount to date for both recoveries is \$231,672. The Department retains the right of reimbursement against any further recoveries from this injury under RCW Chapter 51.24.

CP 85.

Ms. Richardson protested the May 1, 2002 order. CP 260. On June 6, 2002, the Department affirmed its May 1, 2002 order. CP 260. Ms. Richardson appealed the June 6, 2002 order. CP 260. The appeals were consolidated for hearing at the Board. *See* CP 85, 134.

On November 13, 2003, Ms. Richardson and the Department executed a written agreement settling her appeals from the third party distribution orders issued in connection with her two settlements. CP 85, 169. The agreement was signed by Ms. Richardson; her counsel, Teri Rideout; the Department's third party representative, James Nylander; and assistant attorney general, Diane Cornell. CP 85. Ms. Rideout endorsed

the agreement in a November 14, 2003 letter she sent to the industrial appeals judge in which she enclosed a copy of the agreement. CP 85.

On December 24, 2003, the Board issued an order on agreement of parties (OAP) under WAC 263-12-093 that memorialized the terms of the November 13, 2003 agreement and resolved Ms. Richardson's appeals regarding the third party distribution orders. CP 85.

The OAP, in pertinent part, provided:

The Department orders of April 25, 2002 and June 6, 2002 are reversed and remanded and the claims are remanded to the Department of Labor and Industries with instructions as follows: As of November 13, 2003 of the total excess recovery of \$231,672.68, there is currently a remaining balance of \$159,045.53. The Department agrees to reduce the balance by 40 percent (which is \$63,618.21) for a new agreed remaining balance of \$95,427.32 [sic], subject to the offset of future benefits. All outstanding medical bills, related to the August 17, 1995 industrial injury will be adjudicated according to the medical aid rules and credited against the agreed remaining balance of \$95,427.32, as appropriate.

CP 134.

Ms. Richardson did not petition the Board for review. CP 86. On February 24, 2004, the Department issued an order consistent with the OAP. CP 130, 134. On May 4, 2004, Ms. Richardson sent a letter to the Board objecting to the OAP. CP 86. The Board treated Ms. Richardson's letter as a CR 60(b)(6) motion to vacate the OAP and later denied the motion. CP 86.

Ms. Richardson appealed the denial of her CR 60(b)(6) motion to King County Superior Court. CP 86 (Cause No. 04-2-36591-1 SEA). In her appeal, Ms. Richardson asserted that the OAP should have been vacated because, in her view, the Department had applied an incorrect offset figure to her third party recoveries and did not meet its obligation with regard to payment of its share of attorney fees and costs that she incurred in obtaining the two third party settlements. *See* CP 139-43.

Ms. Richardson further asserted: “[t]he dollar figures on the [OAP] are inaccurate and the language of the order along with the request for appeal was not accurately communicated. My original language requested that the order dated December 24, 2003 be revised to accurately reflect what the RCW [sic] which requires Labor and Industries to pay 33% of my legal costs and fees.” CP 142.

The superior court affirmed the denial of the CR 60(b)(6) motion and entered findings, conclusions, and a judgment in favor of the Department. CP 83-87. Ms. Richardson appealed the judgment to this Court, which affirmed. CP 88-92 (Case No. 57560-1-I). The Supreme Court denied Ms. Richardson’s petition for review. CP 94. The superior court judgment and Board decision became final and binding.

**2. The Board Has Already Rejected Ms. Richardson's Contention That The Offset Was (Or Had Been) Applied Incorrectly**

In or about mid-2004, Ms. Richardson filed a number of appeals with the Board – related primarily to her third party recoveries. CP 258-63. This included appeals of letters sent to her by the Department explaining how her offset was being reduced. *See* CP 136-38, 261.

At a March 3, 2005 Board hearing, Ms. Richardson asserted that Mr. Nylander had unilaterally altered the terms of the November 13, 2003 settlement agreement and that the Department had not applied the correct offset figures to her third party recoveries. CP 223.

Mr. Nylander testified and denied the allegation. CP 223. While he acknowledged that Board docket numbers were added after the November 13, 2003 agreement was written, he testified that he had no knowledge that the agreement was altered by someone at the Department. CP 223-25.

Mr. Nylander's testimony also addressed: (1) how offset is applied, generally, and in Ms. Richardson's claim, specifically; (2) that the offset was being reduced for medical bills *related* to her industrial injury based on the OAP, and (3) how the Department had already paid the agreed share of Ms. Richardson's attorney fees and costs. CP 171-234.

On September 19, 2005, the Board dismissed Ms. Richardson's appeals by final order for lack of subject matter of jurisdiction and failure to make a prima facie case. CP 258-263. Ms. Richardson appealed the Board order to King County Superior Court. CP 250 (Cause No. 05-2-24317-1 SEA). The superior court dismissed for lack of subject matter jurisdiction because Ms. Richardson had not served the Board, as required by RCW 51.52.110. CP 250-51. She then appealed to this Court, which affirmed the superior court. CP 253-55 (Case No. 57775-1-I). As this Court noted in its decision, "[a]ll of Richardson's disputes with the Department arose from a disagreement as to whether she had received a proper share of the settlement amount." CP 254. The September 19, 2005 Board decision became a final and binding order.

**C. Offset Is No Longer Preventing Ms. Richardson's Receipt of Benefits And Her Time Loss Was Suspended By A Final Order**

Ms. Richardson has no remaining offset, meaning the Department has already deducted the costs of treatment, time loss, and other benefits against the "offset" amount specified by previous orders. CP 131.

The Department terminated Ms. Richardson's time loss benefits in an order dated July 14, 2006, because she had failed to appear for an independent medical examination and had not provided good cause for her failure to do so. CP 99, 109. Under RCW 51.32.110(1), a claimant is

required to attend independent medical examinations if the Department requests one. RCW 51.32.110(2) provides that benefits can be suspended if the worker refuses to cooperate. Ms. Richardson appealed the Department order to the Board. CP 99.

The industrial appeals judge affirmed the Department's order suspending benefits. CP 99, 111. Ms. Richardson did not petition for review to the Board and the Board adopted the order affirming suspension of her time loss as its final order. CP 112.

As claims manager Maureen Rasa explains, Ms. Richardson had, at that time, refused to attend an independent medical examination. CP 127. Ms. Rasa denied that the Department ever refused to communicate with Ms. Richardson or her husband, Kevin Greenan, provided new issues, not already resolved by prior appeals, were being raised. CP 127.

On February 1, 2012, Mr. Greenan contacted Ms. Rasa to schedule an independent medical examination for Ms. Richardson. CP 128. Ms. Rasa took steps to arrange the examination, but was later notified that Ms. Richardson had changed her mind and would not attend. CP 128. Ms. Rasa told Mr. Greenan that if Ms. Richardson attended an independent medical examination and cooperated with the examiners, her benefits would likely be restored. CP 128.

At one point several years ago, Ms. Richardson had approximately 26 active Board appeals of Department actions. CP 127. These appeals were resolved by the Board and were not further appealed. CP 127. For example, Ms. Richardson appealed a June 5, 2006 letter denying authorization for treatment by a specific medical provider. CP 113-124. The Department's decision was upheld in 2009 by final order of the Board. CP 125.

Her appeals in mid-2004 included denials of payment for prescription medication, remittance advice, and letters sent to her by the Department explaining how her offset was being reduced. CP 258-64. The Board dismissed each these appeals following a hearing. CP 258-64.

Ms. Richardson currently has one appeal at the Board, which is an appeal of a Department order, dated February 28, 2006, involving the rate of previous paid time loss benefits. *See* CP 95-97. The Board stayed the appeal for a period of three years at Ms. Richardson's request. CP 98.

**D. The Superior Court Dismissed Ms. Richardson's Present Claims**

Ms. Richardson commenced the present action – an original action in superior court – against the Department on December 27, 2010, alleging breach of contract and seeking a writ of mandamus. CP 1-9. On December 20, 2011, Ms. Richardson amended her complaint to add claims

for declaratory and/or injunctive relief. CP 50-59. Essentially, she requested that the Department be ordered to comply with prior agreements pertaining to her third party recoveries and to resume payment of her industrial insurance benefits. CP 50-59.

The Department moved for summary judgment on all claims, CP 60-80, which the superior court granted on April 27, 2012. CP 265-67. From that judgment, Ms. Richardson appealed to this Court.

#### **IV. STANDARD OF REVIEW**

This Court reviews an order granting summary judgment de novo. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 561, 242 P.3d 936 (2010). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. CR 56(c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). All facts are considered in the light most favorable to the nonmoving party. *Tiger Oil*, 158 Wn. App. at 562. Summary judgment is appropriate when reasonable persons could reach but one conclusion from the evidence. *Id.*

#### **V. SUMMARY OF THE ARGUMENT**

The superior court properly dismissed Ms. Richardson's action because no genuine issues of material fact exist as to her claims. Ms.

Richardson's request for a writ of mandamus pertaining to matters stemming from her third party recoveries involves claims and issues that have already been litigated to final judgment and is thus barred by res judicata. Her claims for a writ and declaratory and/or injunctive relief also fail because she had other adequate relief available to her under the Industrial Insurance Act. There is no evidence in the record that the Department is out of compliance with any order, statute, or agreement. The superior court properly refused to order the Department to restore benefits without the Department and Board first passing on the issue. Ms. Richardson has waived her breach of contract claim by failing to cite legal authorities or develop argument in her brief. This Court should affirm.

## VI. ARGUMENT

### A. **The Department Has Correctly Calculated Ms. Richardson's Share Of The Recovery Under RCW 51.24.060**

Ms. Richardson argues that the Department has not applied the correct statute to her settlements. App. Br. at 3, 4, 8-9. As discussed below, previous litigation addressed this argument and it may not be re-litigated now. *See* discussion *infra* Part VI.B. Assuming for argument's sake that res judicata does not bar consideration as to whether the correct statute was applied to her settlements, the Department has at all times applied the correct statutory formula.

Workers injured in the course of their employment may receive benefits under the Industrial Insurance Act. RCW 51.04.010 (abolishing civil jurisdiction of the courts of this state over such causes); RCW 51.32.010 (the benefits received under the Industrial Insurance Act “shall be in lieu of any and all rights of action whatsoever against any person whomsoever”). In exchange for these benefits, workers are statutorily prohibited from pursuing tort lawsuits for their industrial injuries. *See* RCW 51.04.010. However, the Act provides a narrow exception for workers injured by third parties, *i.e.*, non-coworker or employer tortfeasors. This exception is codified at RCW 51.24.

The third party statute allows injured workers to pursue civil actions against the third party tortfeasors who caused their industrial injuries. RCW 51.24.030(1). Any recovery made in a third party action is subject to distribution in accordance with RCW 51.24.050 and .060.

Ms. Richardson makes a series of assertions regarding RCW 51.24 and what happened regarding her third party action and her settlement. She asserts that she elected “option A of RCW 51.24.090” and that this election allowed her to pursue negotiations directly with counsel and defendants. App. Br. at 2. She asserts that option B is RCW 51.24.050, “which is the WA State formula rule.” App. Br. at 2. She asserts that when the Department “reserved the right to continue to take funds from

any future settlements,” this “was not her option to settle her industrial claim. Lee opted for a compromise and to obtain her own counsel.” App. Br. at 3. Ms. Richardson further asserts that RCW 51.24.060(3) was misapplied, “rather than RCW 51.24.090 for which Lee opted when she signed the Third Party Election form.” App. Br. at 4. Finally, Ms. Richardson asserts “The discrepancy between the application of the two RCW formulas and the fact that Mr. Nylander adopted the wrong RCW to Lee’s distribution has caused L&I to continue to deny her ongoing benefits, and has reduced her recovery in a substantial manner.” App. Br. at 9.

Ms. Richardson misunderstands the third party statute. “Option A” cases are third party actions where workers elect to pursue the actions on their own. See RCW 51.24.030; *Duskin v. Carlson*, 136 Wn.2d 550, 554, 965 P.2d 611 (1998). Recoveries in these actions are distributed under RCW 51.24.060. “Option B” cases are those where the worker has elected to assign the third party action to the Department for prosecution. RCW 51.24.050, .070. Recoveries in assigned actions are distributed under RCW 51.24.050. Since Ms. Richardson elected to pursue the actions on her own, RCW 51.24.050 does not apply to her third party settlements.

While Ms. Richardson is correct that she elected to pursue the third party actions on her own under “Option A,” a worker cannot make an

“election” under RCW 51.24.090. That statute governs deficient settlements, but contains no election rights or distribution formulas. It is unclear what “two RCW formulas” Ms. Richardson is referring to. However, RCW 51.24.050 and RCW 51.24.090 are inapplicable to her case. The Department properly distributed her third party recoveries under the only applicable formula – RCW 51.24.060.

The distribution formula in RCW 51.24.060 works as follows: the worker’s attorney is paid, the worker receives a share of the recovery free and clear of any Department claim, the Department is reimbursed for workers’ compensation benefits paid to date less its proportionate share of attorney fees, and future workers’ compensation benefits are “offset” against the remaining balance of the recovery. RCW 51.24.060(1)(a)-(e); *Jones v. City of Olympia*, \_\_ Wn. App. \_\_, 287 P.3d 687, 690 (2012). While the excess recovery is initially kept by the worker, the Department retains an interest in the excess, as it is used to offset payment of future benefits to the worker. RCW 51.24.060(1)(d)-(e). *See Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 698, 112 P.3d 552 (2005).

During the course of Ms. Richardson’s appeals of the distribution orders, the parties agreed to reduce the “offset” of \$231,672.68 to \$159,045.53. CP 85, 169. The Department further reduced that amount to \$95,427.32 in order to resolve Ms. Richardson’s appeal in part because of

the systematic error encountered in applying only time loss benefits against offset from the first settlement. *See* CP 85, 169, 254. The Department issued an order consistent with the OAP. CP 130, 134. It has complied with that order and RCW 51.24.060 with its distributions.

Here, the question of whether the Department correctly applied the correct formula to her recoveries was litigated at the Board and superior court. As discussed below, the merits of it should not be revisited now.

**B. Res Judicata Bars Ms. Richardson's Claims**

Ms. Richardson argues that, in her underlying action, she “was not seeking to re-litigate prior administrative appeals or hearings, but rather sought adjudication of specific issues relating to her ongoing treatment and L&I’s refusal to pay for those treatments.” App. Br. at 1. However she argues that the Department incorrectly established and applied the offset from her two third party recoveries. *See* App. Br. at 7-11.

She contends: “the lower court erred by finding that no issues of fact existed regarding the misapplication of the appropriate off-set formulas which has resulted in a reduction of benefits paid by L&I, and more importantly, the cutting-off of current medical treatment and benefits to Lee at the moment.” App. Br. at 10. Ms. Richardson argues, had the proper “formulas” been applied to her recoveries, her benefits would not have been cut off. App. Br. at 7, 9-10. She claims a writ of mandamus

should be issued compelling the Department to “apply the proper formulas and continue her *current* benefits” (emphasis in original). App. Br. at 9.

**1. Res Judicata Bars Relitigation Of Claims That Were Or Could Have Been Litigated In The Prior Actions**

Res judicata prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in the prior action. *See In re Marriage of Dicus*, 110 Wn. App. 347, 355, 40 P.3d 1185 (2002). Res judicata ensures finality of decisions. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000).

The doctrine is designed to discourage piecemeal litigation. *Spokane County v. Miorke*, 158 Wn. App. 62, 69, 240 P.3d 811 (2010). “It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). The doctrine curtails the multiplicity of actions and harassment in the courts. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata encompasses not only what was litigated in the prior action, but what reasonably should have been litigated in the prior action. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997). The courts will dismiss subsequent actions because the relief sought could

have and should have been determined in the prior action. *E.g., Kelly-Hansen*, 87 Wn. App. at 329-30.

The threshold requirement of res judicata is a final judgment on the merits. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Res judicata requires identity between a prior judgment and a subsequent action as to: (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. *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008).

The trial court properly granted summary judgment because there is no genuine issue of material fact to each of these elements.

**2. All Of The Elements Of Res Judicata Are Established**

**a. The Prior Actions Resulted In Final Judgments**

Ms. Richardson's appeals of the third party distribution orders resulted in the December 24, 2003 OAP issued by the Board and a final judgment on the merits (King County Superior Court No. 04-2-36591-1). Additionally, her numerous appeals to the Board in mid-2004 resulted in a final judgment entered by the Board that has res judicata effect. *See* RCW 51.52.104 ("In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals

judge shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.”).

**b. There Is Identity Of “Subject Matter”**

The “subject matter” in the prior actions and the action here are identical. As explained above, the prior actions resulted in final judgments involving Ms. Richardson’s third party recoveries. Claims and issues litigated in the two prior actions included: (1) the amount of the offset; (2) application of the offset; and (3) whether the Department paid its agreed share of attorney fees and costs. In short, Ms. Richardson asserted then she should have received a larger share of the settlements.

Though the present action is couched in the form of a civil lawsuit against the Department, as opposed to an appeal from a final Board order like the prior actions, Ms. Richardson clearly seeks to re-litigate the same third party claims and issues that were previously decided by final judgments. She is simply using a different medium to assert the same claims and issues that were already litigated or should have been litigated previously.

**c. There Is Identity Of The “Cause Of Action”**

The cause of action, or claims for relief, are identical. Courts have identified factors in determining whether the “claims for relief” are the same: (1) whether rights or interests established in the prior judgment

would be destroyed or impaired by prosecution in the second action; (2) whether substantially the same evidence is or would be presented in the two actions; (3) whether the two actions involve infringement of the same right; and (4) whether the two actions arise out of the same transactional nucleus of facts. *E.g., Rains v. State*, 100 Wn.2d 660, 664, 674, 165 P.2d (1983).

First, the prior actions established rights between Ms. Richardson and the Department with regard to third party issues, such as the amount and application of the offset. Those previously established rights would be significantly impaired by allowing Ms. Richardson to maintain the present action, which could potentially lead to a different result.

Second, substantially the same evidence would be presented in the present action that was presented or should have been presented in the prior actions. Just like in the prior actions, Ms. Richardson asserts here that the Department applied the wrong “formulas” and incorrectly calculated and applied offset in violation of prior written agreements (*i.e.*, the October 10, 2001 and November 13, 2003 agreements). *Compare App Br. at 2-6 with CP 132-33, 139-43, 171-234.* .

She also claims now, as she has before, that Mr. Nylander altered the November 13, 2003 agreement to her detriment. *Compare App. Br. at 5, 8 with CP 171-234.* However, she has already litigated this issue in the

2004 Board appeals. She questioned Mr. Nylander as a witness at the hearing and, while he acknowledged that the agreement had been altered to add docket numbers, he specifically denied doing it or having knowledge of anyone that did. Ms. Richardson would need to bring Mr. Nylander back into the superior court to re-examine him. Ms. Richardson would need to present these agreements and other evidence, such as Board and court orders, that she contends the Department was out of compliance with. Ms. Richardson either presented or reasonably could have presented this same evidence in her prior actions.

Third, in this action, as with the prior actions, Ms. Richardson asserts that the Department claimed an offset greater than it was entitled to under previous agreements or that it applied it incorrectly. *See* CP 139-43, 187; App. Br. at 2-7. Doing so, she asserted then and continues to assert now, would have reduced her offset sooner and restored her industrial insurance benefits sooner. *See* CP 139-43, 182-83, 186-89; App. Br. at 6-7. The prior actions and the action here, involve an allegation of infringement of the same right.

Finally, Ms. Richardson alleges nearly the same facts in this action, as she did in the prior actions, regarding proper distribution of her two third party recoveries. *E.g., compare* App. Br. at 1-6 *with* CP 132-

133, 139-43, 171-234. The actions arise out of the same transactional nucleus of facts.

**d. There Is Identity Of Parties And Quality Of Persons For Or Against Whom The Claims Were Made**

The party asserting the claims in the two prior actions is the same party asserting the claims here. Ms. Richardson was represented then by counsel, and she is represented now. Thus, there is also an identity of the “quality of the persons for or against whom the claim is made.”

Her claim for a writ is barred by res judicata.

**C. Ms. Richardson Failed To Satisfy Elements Necessary For The Issuance Of A Writ Of Mandamus**

A writ of mandate is provided for in RCW 7.16. Mandamus is an extraordinary remedy. *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). A court may issue a writ of mandamus “to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.” RCW 7.16.160. A writ is issued only when “there is not a plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170. The rule that a writ is not issued if there is an adequate remedy applies to industrial insurance cases. *See State ex rel. Burkhard v. Superior Court for Clark County*, 11 Wn.2d 600, 603, 120 P.2d 477

(1941) (dismissing a writ application because claimant had adequate remedy under industrial insurance laws). The court will issue a writ in an appropriate case. *See Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 220, 752 P.2d 1357 (1988).

The application for a writ must satisfy three elements: (1) the party subject to the writ has a clear duty to act, (2) the applicant has no plain, speedy, and adequate remedy at law, and (3) the applicant is beneficially interested. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

Here, the Department does not dispute that Ms. Richardson is “beneficially interested” in mandamus relief. *See* RCW 7.16.160. However, because she cannot satisfy the required “duty” or “remedy” elements of her application, the trial court properly denied her request for a writ.

With respect to the “duty” requirement, at superior court, she sought an order “compelling the Department to honor its agreements,” apparently referring to the October 10, 2001, and November 13, 2003 agreements. CP 50-59. However, she failed to show how the Department has contravened any provision of any agreement. Writs should not be issued to direct general courses of conduct. *Walker*, 124 Wn.2d at 407.

While there was a prior dispute over compliance with the October 10, 2001 agreement, the parties resolved the dispute with the November 13, 2003 settlement agreement. CP 85. The Board issued an OAP and the Department issued a revised distribution order consistent with the OAP. CP 85-86, 130, 134.

In the 2004 appeals to the Board, Mr. Nylander explained how the Department had complied with the OAP, including addressing Ms. Richardson's allegations against him. CP 171-234. Those appeals were dismissed. CP 258-64. Ms. Richardson failed to present any evidence creating a genuine issue of material fact that the Department has a clear duty to act. No reasonable mind could differ that the Department has acted consistent with all agreement and orders.

Moreover, there was an adequate "remedy" available to Ms. Richardson under the Industrial Insurance Act regarding her third party claims and issues. RCW 51.52.050 and .060 allow for protests and appeals of Department orders. In fact, Ms. Richardson pursued this remedy by appealing the third party distribution orders to the Board. She also filed numerous appeals with the Board in 2004 regarding third party claims and issues, which again resulted in a final and binding judgment. Her allegations against Mr. Nylander (*See App. Br. at 5-6, 8-9*) were addressed in these proceedings. CP 171-234. She had an available

remedy under the Industrial Insurance Act and, in fact, pursued this remedy vigorously. Her claim for mandamus relief was properly denied.

**D. Ms. Richardson's Claims For Injunctive And Declaratory Relief Were Properly Denied As Other Adequate Remedies Were Available**

Ms. Richardson claims relief under the Uniform Declaratory Judgments Act, RCW 7.24. CP 57-58. This act does not apply to the type of claims adjudication issue she raises here. As with requests for a writ of mandamus, a party is not entitled to declaratory relief if there is an adequate alternative remedy. *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961) (affirming trial court's dismissal of a declaratory judgment action because other relief was available); *Richards v. City of Pullman*, 134 Wn. App. 876, 883, 142 P.3d 1121 (2006) (affirming dismissal of homeowner's declaratory judgment action for lack of subject matter jurisdiction where adequate remedies were available under the Land Use Petition Act).

Ms. Richardson has an adequate remedy under the Industrial Insurance Act. The Industrial Insurance Act is the exclusive remedy for injured workers. RCW 51.04.010. "Except as provided in RCW 51.52.110, all jurisdiction of the courts of this state for workers' injuries is abolished by the Industrial Insurance Act." *Fay v. NW. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990) (internal quotations omitted).

Even if the Uniform Declaratory Judgments Act applies, Ms. Richardson has not shown she is entitled to relief under it. For the Uniform Declaratory Judgments Act to apply, there must be a justiciable controversy. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). A justiciable controversy is (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Id.* at 815.

Here, Ms. Richardson seeks injunctive and/or declaratory relief in the form of ordering the Department to “*continue* her current benefits.” *See* App. Br. at 9 (emphasis in original). With regard to her time loss benefits, these were suspended by the Department in 2006. CP 99. Ms. Richardson appealed to the Board, which affirmed the Department’s suspension by final order in 2009. CP 99. Ms. Richardson had other remedies available to challenge the time loss suspension under the Industrial Insurance Act and exercised them by filing her appeal.<sup>2</sup>

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<sup>2</sup> The final Board order affirming the Department’s suspension of her time loss benefits also has res judicata effect under RCW 51.52.104.

Regarding her medical benefits, Ms. Rasa declared that if Ms. Richardson attended an independent medical examination and cooperated with the examiners, her benefits would likely be reinstated. CP 128. Independent medical examinations allow the Department to resolve medical issues, such as determining whether or not a worker's contended condition is related to his or her industrial injury. *See* RCW 51.36.070.

Contrary to what Ms. Richardson appears to be arguing at App. Br. at 9, her offset extinguished years ago. CP 131. The offset is not precluding her receipt of benefits. *See* RCW 51.24.060(1)(e) (providing the Department shall suspend payment of benefits until offset is satisfied). However, she must still be otherwise eligible for benefits under Title 51.

Ms. Richardson asserted below that the Department has refused to communicate with her regarding her industrial insurance claim and an order compelling it to communicate with her should issue. CP 51-56. The record demonstrates otherwise. In February 2012, claims manager, Ms. Rasa, spoke with Mr. Greenan regarding an independent medical examination and was told that Ms. Richardson would cooperate. CP 128. Ms. Rasa then learned that Ms. Richardson was no longer interested in attending an independent medical examination. CP 128.

The Department advised Ms. Richardson that, while it would not discuss matters that have already been resolved by final judgment, it

would discuss new information related to her claim, as evidenced by Ms. Rasa's discussion with Mr. Greenan and her effort to schedule an independent medical examination. CP 127-28. Again, Ms. Rasa declared that if Ms. Richardson would simply submit to an independent medical examination, her benefits would likely be restored. CP 128.

Her claims for declaratory and/or injunctive relief were properly dismissed by the superior court.

**E. The Superior Court Properly Dismissed The Claims For Declaratory And Injunctive Relief Because Ms. Richardson Improperly Attempted To Bypass The Department And The Board On A Benefits Decision**

As stated above, Ms. Richardson requests relief in the form of declaratory and/or injunctive relief ordering the Department to restore her benefits. App. Br. at 9. Also, as explained above, mandamus and injunctive and/or declaratory relief is not warranted in this case. Furthermore, Ms. Richardson did not put any specific Board order (reviewing a claims decision by the Department) before the superior court for review and she is not entitled to superior court consideration of her claim. *See Davis v. Dep't of Labor & Indus.*, 159 Wn. App. 437, 441-43, 245 P.3d 253 (2011) (court did not consider claim regarding workers' compensation matter in third party case filed in superior court because the Department needed to first consider matter).

The “[j]urisdiction of the superior court is limited to review of departmental proceedings on appeals from orders of the Board.” *Dils*, 51 Wn. App. at 217. Appeals from the Board invoke the trial court’s appellate jurisdiction, not general or original jurisdiction. *Fay*, 115 Wn.2d at 197; *Shufeldt v. Dep’t of Labor & Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495 (1961).

The Board and superior court considering matters “not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction.” *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). If a question is not first passed upon by the Department, it cannot be reviewed by either the Board or the courts. *Id.*

Here, Ms. Richardson’s claim for an order compelling the Department to reinstate her benefits simply bypassed the Department and the Board and is not appropriate under the Industrial Insurance Act. The superior court’s dismissal of Ms. Richardson’s declaratory and/or injunctive relief claims were properly dismissed as a matter of law.

**F. Ms. Richardson’s Breach Of Contract Claims Have Been Waived Because She Failed To Cite Legal Authorities And Develop Reasoned Arguments Regarding This Claim**

At the superior court, Ms. Richardson raised a contract claim. CP 56. In her brief, Ms. Richardson did not renew her breach of contract

claims or provide specific legal authority, with supporting citations to the record, as to how the Department breached any contract with her or that the superior court erred in dismissing her breach of contract claims as a matter of law. App. Br. 1-11. Ms. Richardson argues generally that the superior court erred in dismissing her “claims” without providing further argument regarding her breach of contract theory. *See* App. Br. at 7.

Such passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *See* RAP 10.3(a)(6); RAP 10.4; *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012); *Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Courts “do not consider conclusory arguments that do not cite authority.” *West*, 168 Wn. App. at 187.

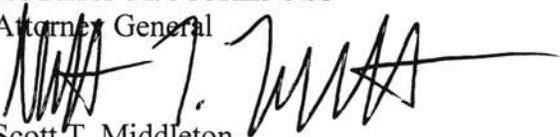
Here, it is unclear whether she argues breach of contract. By failing to provide factual and legal support, Ms. Richardson failed to present developed argument necessary for this Court’s consideration. *See West*, 168 Wn. App. at 187; *Joy*, 170 Wn. App. 629-30; RAP 10.3(a)(6). Even if the Court finds the breach of contract claim is properly before it to warrant consideration, her breach of contract claim lacks merit and was barred by res judicata for the reasons explained above. *See* Part VI.B *supra*; CP 67-73. It was properly dismissed by the superior court.

**VII. CONCLUSION**

For the foregoing reasons, the Department asks the Court to affirm the April 27, 2012 judgment.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of January, 2013.

ROBERT M. MCKENNA  
Attorney General



Scott T. Middleton  
Assistant Attorney General  
WSBA No. 37920  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 587-5159