

Richardson-Greenan, Lee

COLLATERAL ESTOPPEL

Elements

A party asserting collateral estoppel must establish four elements: (1) the issue decided in the earlier proceeding is 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.***In re Lee Richardson-Greenan, BIIA Dec., 19 23798 (2023)*** [dissent] [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 23-2-03190-3 SEA. The Board's decision was affirmed.*]

RES JUDICATA

Elements

A party asserting res judicata must establish five elements as between a prior action and a subsequent challenged action: concurrence of identity of subject matter, of cause of action, of persons and parties, and in the quality of the persons for or against whom the claim is made; and the application of res judicata cannot work an injustice.***In re Lee Richardson-Greenan, BIIA Dec., 19 23798 (2023)*** [dissent] [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 23-2-03190-3 SEA. The Board's decision was affirmed.*]

Scroll down for order.

1 she is entitled to recalculation under RCW 51.32.240. We agree with our industrial appeals judge.
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3 The Department orders paying time-loss compensation are **AFFIRMED**.

4 **DISCUSSION**

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6 A worker's monthly wage rate at the time of injury is an important determination in industrial
7 insurance claims because a worker's total disability rate is based on the wage rate. In these appeals,
8 Ms. Richardson-Greenan claims that 27 years ago the Department made a mistake when it calculated
9 her monthly wage. She has made this allegation in prior appeals, but those appeals were dismissed.
10 The question before us in this most recent appeal is whether Ms. Richardson-Greenan's third request
11 for correction of her monthly wage rate is barred by the doctrines of res judicata or collateral estoppel.
12 As explained below, it is.

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14 The doctrines of collateral estoppel and res judicata dictate that claimants are "entitled to one
15 bite of the apple."¹ Res judicata, called claim preclusion, and collateral estoppel, called issue
16 preclusion, apply to quasi-judicial decisions by administrative tribunals such as the Board, and to the
17 courts.² Ms. Richardson-Greenan's third appeal of her wage rate is barred by both res judicata and
18 collateral estoppel. Our industrial appeals judge properly granted summary judgment in the
19 Department's favor. Ms. Richardson-Greenan's appeals to this Board on the same issue have
20 become incessant, and in this order, we explain that her wage rate cannot be changed as a matter
21 of law. Summary judgment in favor of the Department was proper.

22 **Res Judicata and Collateral Estoppel Preclude Relitigation of this Claim and Issue.**

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24 The doctrine of *res judicata* precludes relitigation of a claim when a prior proceeding involving
25 the same parties and issues culminated in a judgment on the merits.³ Here,
26 Ms. Richardson-Greenan's voluntary dismissal over 25 years ago resulted in a judgment on the
27 merits because, by statute,⁴ a party aggrieved by a decision of the Department has only 60 days to
28 appeal the Department's decision. Her decision to voluntarily dismiss the appeal made the
29 Department's wage rate calculation final and binding.⁵ It cannot now be changed. A party seeking
30 to apply res judicata must establish five elements as between a prior action and a subsequent
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42 ¹ *Weaver v. City of Everett*, 194 Wn.2d 464, 483 (2019).

43 ² *Lejeune v. Clallam Cty.*, 64 Wn. App. 257, 264–65 (1992); *State v. Dupard*, 93 Wash.2d 268, 274 (1980); *Miller v. St.*
44 *Regis Paper Co.*, 60 Wn.2d 484, 485 (1962); see *McCarthy v. Dep't of Social and Health Servs.*, 110 Wn.2d 812, 823
45 (1988) (collateral estoppel); *Malland v. Dep't of Retirement Sys.*, 103 Wash.2d 484, 490 (1985).

46 ³ *Weaver*, at 480; *Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 395-96 (1967).

47 ⁴ RCW 51.52.060.

⁵ *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

1 challenged action: concurrence of identity . . . (1) of subject matter; (2) of cause of action; (3) of
2 persons and parties; (4) in the quality of the persons for or against whom the claim is made;⁶ and
3 (5) the application of res judicata cannot work an injustice. As our industrial appeals judge explained,
4 res judicata applies to issues that were litigated or *could have been litigated* in a prior action.⁷
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7 The doctrine of collateral estoppel means that when an issue of ultimate fact has once been
8 determined by a valid and final judgment, that issue cannot again be litigated between the same
9 parties in any future lawsuit.⁸ For collateral estoppel to apply, the party against whom the doctrine is
10 asserted must have had a full and fair opportunity to litigate their case in a prior proceeding.⁹ A party
11 asserting collateral estoppel must establish four elements: (1) the issue decided in the earlier
12 proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding
13 ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a
14 party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel
15 does not work an injustice on the party against whom it is applied.¹⁰
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18 Both of these doctrines preclude Ms. Richardson-Greenan from litigating these issues and
19 claims again. In her previous appeals, Ms. Richardson-Greenan alleged that the Department
20 incorrectly calculated her wage rate. The subject matter was the same, the cause of action was the
21 same, the parties were the same, and the quality of the person against whom the claim was made
22 (the Department) was the same. We also hold that the application of res judicata and collateral
23 estoppel in this appeal would not work an injustice against her. Ms. Richardson-Greenan didn't
24 present any summary judgment evidence tending to show that the Department in fact incorrectly
25 calculated her wage rate.
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28 Res judicata and collateral estoppel are both applicable in this case and prevent the relitigation
29 of Ms. Richardson-Greenan's wage rate at the time of injury. Ms. Richardson-Greenan seeks to have
30 her wage rate recalculated to include additional benefits such as quarterly bonuses, healthcare
31 benefits, retirement benefits, and monthly expense reimbursement. Ms. Richardson-Greenan was
32 aware that the wage order did not include these benefits in 1995. She was aggrieved by the
33 Department's order setting her wage rate at that time. She could have timely appealed the order
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43 ⁶ *Weaver*, at 480; *Bordeaux*, at 395-96.

44 ⁷ *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759 (1995).

45 ⁸ *Weaver*, at 473; *Dupard*, at 273.

46 ⁹ *Hanson v. City of Snohomish*, 121 Wn.2d 552 (1993).

47 ¹⁰ *Weaver*, at 473-74.

1 seeking the inclusion these benefits. She didn't. So, the 1995 wage order became final and binding
2 in 1995. In 1997, Ms. Richardson-Greenan filed a late appeal to the 1995 wage order. She could
3 have raised the same arguments raised in the current appeal. The Washington Supreme Court has
4 long held that *res judicata* prohibits the relitigation of claims and issues that were litigated, or *could*
5 *have been litigated*, in a prior action.¹¹
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9 In the 1990s, Ms. Richardson-Greenan voluntarily dismissed her appeal and the order became
10 final and binding again. She didn't appeal to the courts. Many years later, she appealed again.
11 When she lost before the Board, she again did not appeal to the courts. That second order became
12 final. In the present case, she has appealed orders paying time-loss compensation, making the same
13 arguments. She again alleges that the orders are based on an incorrect monthly wage at the time of
14 injury. The orders presently on appeal, however, do not calculate or recalculate her wages. They
15 apply the 1995 wage calculation to her ongoing award for time-loss compensation benefits. The
16 wage calculation has already been adjudicated. The summary judgment evidence presented in the
17 present appeals fails to establish that Ms. Richardson-Greenan received the benefits at the time of
18 her industrial injury—necessary to establish a different wage calculation. She didn't offer summary
19 judgment evidence to show the amount of the benefit she contends was paid by the employer on her
20 behalf. She failed to offer summary judgment evidence to show the amount or frequency of any
21 bonus payments, expense reimbursements, or the amount of employer contributions towards
22 healthcare benefits or retirement benefits. Without such evidence, there is no basis to recalculate
23 the wage rate or to deny summary judgment even if *res judicata* and collateral estoppel didn't apply.
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27 Ms. Richardson-Greenan also seeks the inclusion of benefits in her wage calculation that are
28 not properly considered wages under RCW 51.08.178. She argues *Cockle v. Department of Labor*
29 *and Industries*¹² permits the inclusion of employer contributions of healthcare benefits in an injured
30 worker's wage calculation. However, the *Cockle* decision was issued in 2001, approximately six
31 years after her wage order was issued. Neither the courts nor any statute has made the inclusion of
32 health care benefits in a worker's wage calculation retroactive. To the contrary, we have long held
33 that these benefits are not retroactively applied because a judicial change in the interpretation of the
34 law does not affect the finality of the Department's order setting an injured worker's wage rate.¹³
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46 ¹¹ *Pederson v. Potter*, 103 Wn. App. 62, 67 (2000); *Loveridge*, at 763.

47 ¹² 142 Wn.2d 801 (2001).

¹³ *In re Rosalie Hyatt*, BIIA Dec., 02 13243 (2003).

1 Additionally, we long ago determined that retirement benefit contributions and transportation expense
2 reimbursements paid by an employer are not core, non-fringe benefits critical to protecting the basic
3 health and survival of an injured worker and are not considered wages under RCW 51.08.178(1).¹⁴
4 So, the payment of retirement contributions didn't change her wage rate. There is no showing of
5 injustice by applying the doctrines of res judicata or collateral estoppel.
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9 In response to the dissent, we are not persuaded by the arguments that *Birrueta v. Department*
10 *of Labor and Industries*¹⁵ allows for an adjustment of benefits for Ms. Richardson-Greenan or that the
11 summary judgment evidence shows a genuine issue of material fact. The order the worker appealed
12 in *Birrueta* had not been appealed prior to that litigation. But here, Ms. Richardson-Greenan
13 previously appealed the very same type of order, and was heard on this very issue, the correctness
14 of the wage rate, not just once, but twice. Res judicata is applied to orders that were litigated or could
15 have been litigated. Further, there is no summary judgment evidence in the record tending to show
16 that anyone made a clerical error in determining her wage rate. Ms. Richardson-Greenan was aware
17 in 1995 that her wage order did not include any bonus wages, healthcare benefits, retirement benefits,
18 or monthly expense reimbursements. She had multiple opportunities to pursue these arguments in
19 prior litigation and failed to do so. There is no injustice here, and no genuine issue of material fact in
20 the summary judgment pleadings. The Department is entitled to summary judgment and we affirm
21 the Department orders.
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28 DECISION

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30 In Docket No. 19 23798, the claimant, Lee A. Richardson-Greenan, filed a timely protest with
31 the Department of Labor and Industries. The Department forwarded it to the Board of Industrial
32 Insurance Appeals as an appeal. The claimant appeals a Department order dated July 24, 2019. In
33 this order, the Department affirmed its orders March 25, 2019, April 22, 2019, June 17, 2019,
34 July 1, 2019, and July 15, 2019, which paid compensation in the amount of \$1,998.92, \$1,998.92,
35 \$1,998.92, \$2,006.31, and \$2,102.38 respectively. This order is correct and is **AFFIRMED**.
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39 In Docket No. 20 11899, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
40 Board of Industrial Insurance Appeals on February 6, 2020. The claimant appeals a Department
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45 ¹⁴ *In re Ronald Tucker*, BIIA Dec., 00 11573 (2001); See *In re Douglas Brammer*, Dckt. No. 06 10641
46 (February 7, 2007).

47 ¹⁵ 186 Wn.2d 537 (2016).

1 order dated December 2, 2019. In this order, the Department paid compensation in the amount of
2 \$2,102.38. This order is correct and is **AFFIRMED**.

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4 In Docket No. 20 11990, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
5 Board of Industrial Insurance Appeals on February 6, 2020. The claimant appeals a Department
6 order dated December 16, 2019. In this order, the Department paid compensation in the amount of
7 \$2,102.38. This order is correct and is **AFFIRMED**.

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10 In Docket No. 20 11991, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
11 Board of Industrial Insurance Appeals on February 7, 2020. The claimant appeals a Department
12 order dated January 13, 2020. In this order, the Department paid compensation in the amount of
13 \$2,175.05. This order is correct and is **AFFIRMED**.

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16 In Docket No. 20 11992, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
17 Board of Industrial Insurance Appeals on February 7, 2020. The claimant appeals a Department
18 order dated January 27, 2020. In this order, the Department paid compensation in the amount of
19 \$2,180.64. This order is correct and is **AFFIRMED**.

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22 In Docket No. 20 14934, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
23 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
24 dated February 24, 2020. In this order, the Department paid compensation in the amount of
25 \$2,180.64. This order is correct and is **AFFIRMED**.

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28 In Docket No. 20 14935, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
29 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
30 dated March 9, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
31 This order is correct and is **AFFIRMED**.

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34 In Docket No. 20 14936, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
35 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
36 dated March 23, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
37 This order is correct and is **AFFIRMED**.

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40 In Docket No. 20 14937, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
41 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
42 dated April 6, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
43 This order is correct and is **AFFIRMED**.

1 In Docket No. 20 14938, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
2 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
3 dated April 20, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
4 This order is correct and is **AFFIRMED**.
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7 In Docket No. 20 14939, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
8 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
9 dated May 4, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
10 This order is correct and is **AFFIRMED**.
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13 In Docket No. 20 15030, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
14 Board of Industrial Insurance Appeals on May 19, 2020. The claimant appeals a Department order
15 dated May 18, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
16 This order is correct and is **AFFIRMED**.
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19 In Docket No. 20 17632, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
20 Board of Industrial Insurance Appeals on July 13, 2020. The claimant appeals a Department order
21 dated June 1, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
22 This order is correct and **AFFIRMED**.
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25 In Docket No. 20 17633, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
26 Board of Industrial Insurance Appeals on July 13, 2020. The claimant appeals a Department order
27 dated June 15, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
28 This order is correct and is **AFFIRMED**.
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31 In Docket No. 20 17634, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
32 Board of Industrial Insurance Appeals on July 13, 2020. The claimant appeals a Department order
33 dated June 29, 2020. In this order, the Department paid compensation in the amount of \$2,180.64.
34 This order is correct and is **AFFIRMED**.
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37 In Docket No. 20 20230, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
38 Board of Industrial Insurance Appeals on September 21, 2020. The claimant appeals a Department
39 order dated July 27, 2020. In this order, the Department paid compensation in the amount of
40 \$2,245.74. This order is correct and is **AFFIRMED**.
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43 In Docket No. 20 20231, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
44 Board of Industrial Insurance Appeals on September 21, 2020. The claimant appeals a Department
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1 order dated August 10, 2020. In this order, the Department paid compensation in the amount of
2 \$2,245.74. This order is correct and is **AFFIRMED**.

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4 In Docket No. 20 20232, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
5 Board of Industrial Insurance Appeals on September 21, 2020. The claimant appeals a Department
6 order dated August 24, 2020. In this order, the Department paid compensation in the amount of
7 \$2,245.74. This order is correct and is **AFFIRMED**.

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10 In Docket No. 20 20233, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
11 Board of Industrial Insurance Appeals on September 21, 2020. The claimant appeals a Department
12 order dated September 3, 2020. In this order, the Department paid compensation in the amount of
13 \$2,245.74. This order is correct and is **AFFIRMED**.

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16 In Docket No. 20 27533, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
17 Board of Industrial Insurance Appeals on November 23, 2020. The claimant appeals a Department
18 order dated September 21, 2020. In this order, the Department paid compensation in the amount of
19 \$2,245.74. This order is correct and is **AFFIRMED**.

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22 In Docket No. 20 27534, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
23 Board of Industrial Insurance Appeals on November 23, 2020. The claimant appeals a Department
24 order dated October 5, 2020. In this order, the Department paid compensation in the amount of
25 \$2,245.74. This order is correct and is **AFFIRMED**.

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28 In Docket No. 20 27535, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
29 Board of Industrial Insurance Appeals on November 23, 2020. The claimant appeals a Department
30 order dated October 19, 2020. In this order, the Department paid compensation in the amount of
31 \$2,245.74. This order is correct and is **AFFIRMED**.

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34 In Docket No. 20 28336, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
35 Board of Industrial Insurance Appeals on December 15, 2020. The claimant appeals a Department
36 order dated October 19, 2020. In this order, the Department paid compensation in the amount of
37 \$2,245.74. This order is correct and is **AFFIRMED**.

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40 In Docket No. 20 28337, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
41 Board of Industrial Insurance Appeals on December 15, 2020. The claimant appeals a Department
42 order dated November 2, 2020. In this order, the Department paid compensation in the amount of
43 \$2,245.74. This order is correct and is **AFFIRMED**.

1 In Docket No. 20 28338, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
2 Board of Industrial Insurance Appeals on December 15, 2020. The claimant appeals a Department
3 order dated November 16, 2020. In this order, the Department paid compensation in the amount of
4 \$2,245.74. This order is correct and is **AFFIRMED**.
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7 In Docket No. 20 28339, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
8 Board of Industrial Insurance Appeals on December 15, 2020. The claimant appeals a Department
9 order dated November 30, 2020. In this order, the Department paid compensation in the amount of
10 \$2,245.74. This order is correct and is **AFFIRMED**.
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13 In Docket No. 20 28430, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
14 Board of Industrial Insurance Appeals on December 15, 2020. The claimant appeals a Department
15 order dated December 14, 2020. In this order, the Department paid compensation in the amount of
16 \$2,245.74. This order is correct and is **AFFIRMED**.
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19 In Docket No. 21 11532, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
20 Board of Industrial Insurance Appeals on February 16, 2021. The claimant appeals a Department
21 order dated December 14, 2020. In this order, the Department paid compensation in the amount of
22 \$2,245.74. This order is correct and is **AFFIRMED**.
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25 In Docket No. 21 11533, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
26 Board of Industrial Insurance Appeals on February 16, 2021. The claimant appeals a Department
27 order dated December 28, 2020. In this order, the Department paid compensation in the amount of
28 \$2,245.74. This order is correct and is **AFFIRMED**.
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31 In Docket No. 21 11534, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
32 Board of Industrial Insurance Appeals on February 16, 2021. The claimant appeals a Department
33 order dated January 11, 2021. In this order, the Department paid compensation in the amount of
34 \$2,245.74. This order is correct and is **AFFIRMED**.
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37 In Docket No. 21 11536, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
38 Board of Industrial Insurance Appeals on February 16, 2021. The claimant appeals a Department
39 order dated January 25, 2021. In this order, the Department paid compensation in the amount of
40 \$2,245.74. This order is correct and is **AFFIRMED**.
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43 In Docket No. 21 11537, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
44 Board of Industrial Insurance Appeals on February 16, 2021. The claimant appeals a Department
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1 order dated February 8, 2021. In this order, the Department paid compensation in the amount of
2 \$2,245.74. This order is correct and is **AFFIRMED**.

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4 In Docket No. 21 14131, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
5 Board of Industrial Insurance Appeals on April 14, 2021. The claimant appeals a Department order
6 dated February 22, 2021. In this order, the Department paid compensation in the amount of
7 \$2,245.74. This order is correct and is **AFFIRMED**.

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10 In Docket No. 21 14132, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
11 Board of Industrial Insurance Appeals on April 14, 2021. The claimant appeals a Department order
12 dated March 8, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
13 This order is correct and is **AFFIRMED**.

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16 In Docket No. 21 14133, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
17 Board of Industrial Insurance Appeals on April 15, 2021. The claimant appeals a Department order
18 dated March 22, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
19 This order is correct and is **AFFIRMED**.

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22 In Docket No. 21 14134, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
23 Board of Industrial Insurance Appeals on April 15, 2021. The claimant appeals a Department order
24 dated April 5, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
25 This order is correct and is **AFFIRMED**.

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28 In Docket No. 21 16992, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
29 Board of Industrial Insurance Appeals on June 24, 2021. The claimant appeals a Department order
30 dated April 19, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
31 This order is correct and is **AFFIRMED**.

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34 In Docket No. 21 16993, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
35 Board of Industrial Insurance Appeals on June 24, 2021. The claimant appeals a Department order
36 dated May 3, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
37 This order is correct and is **AFFIRMED**.

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40 In Docket No. 21 16994, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
41 Board of Industrial Insurance Appeals on June 24, 2021. The claimant appeals a Department order
42 dated May 17, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
43 This order is correct and is **AFFIRMED**.

1 In Docket No. 21 16995, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
2 Board of Industrial Insurance Appeals on June 24, 2021. The claimant appeals a Department order
3 dated May 27, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
4 This order is correct and is **AFFIRMED**.
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7 In Docket No. 21 17090, the claimant, Lee A. Richardson-Greenan, filed an appeal with the
8 Board of Industrial Insurance Appeals on June 24, 2021. The claimant appeals a Department order
9 dated June 14, 2021. In this order, the Department paid compensation in the amount of \$2,245.74.
10 This order is correct and is **AFFIRMED**.
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13 **FINDINGS OF FACT**

- 14 1. On April 1, 2020, and August 5, 2021, an industrial appeals judge certified
15 that the parties agreed to include the Jurisdictional Histories in the Board
16 record solely for jurisdictional purposes.
- 17 2. On August 31, 1995, the claimant, Lee A Richardson-Greenan filed an
18 application for benefits with the Department of Labor and Industries for an
19 industrial injury occurring on August 17, 1995. The claim was allowed
20 and benefits were paid.
- 21 3. The Department of Labor and Industries issued an order establishing
22 Ms. Richardson-Greenan's wage rate on September 6, 1995. The order
23 included standard 60-day appeal language.
- 24 4. On January 8, 1997, Ms. Richardson-Greenan filed a protest of the 1995
25 order with the Department. On February 3, 1997, the Department
26 thereafter issued an order declining to reconsider its September 6, 1995
27 wage rate order because the protest was untimely.
- 28 5. Ms. Richardson-Greenan appealed the February 3, 1997 order to the
29 Board. On May 30, 1997, Ms. Richardson-Greenan moved to voluntarily
30 dismiss her appeal.
- 31 6. On June 4, 1997, the Board issued an Order of Dismissal.
- 32 7. On December 6, 2005; December 12, 2005; December 20, 2005;
33 January 3, 2006; January 17, 2006; April 25, 2006; May 23, 2006; and
34 June 6, 2006, the Department issued orders paying time-loss
35 compensation based upon the final and binding wage rate order of
36 September 6, 1995.
- 37 8. Ms. Richardson-Greenan thereafter timely appealed the 2005 and 2006
38 time-loss compensation orders. The 2005 and 2006 appeals are of orders
39 that are identical to the Department's final order of September 6, 1995, in
40 terms of subject matter, cause of action, persons and parties, and the
41 quality of person for or against who the claim is made.
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9. On July 27, 2009, industrial appeals Judge Jeff Burkhart issued a Proposed Decision and Order granting the Department's motion for summary judgment on grounds the claimant was barred by *res judicata* from relitigating the wage rate via the 2005 and 2006 appeals.
 10. No Petition for Review was taken from the July 27, 2009 Proposed Decision and Order and on September 15, 2009, the Board issued an Order Adopting the Proposed Decision and Order.
 11. On July 24, 2019; December 2, 2019; December 16, 2019; January 13, 2020; January 27, 2020; February 24, 2020; March 9, 2020; March 23, 2020; April 6, 2020; April 20, 2020; May 4, 2020; May 18, 2020; June 1, 2020; June 15, 2020; June 29, 2020; July 27, 2020; August 10, 2020; August 24, 2020; September 3, 2020; September 21, 2020; October 5, 2020; October 19, 2020; October 19, 2020; November 2, 2020; November 16, 2020; November 30, 2020; December 14, 2020; December 14, 2020; December 28, 2020; January 11, 2021; January 25, 2021; February 8, 2021; February 22, 2021; March 8, 2021; March 22, 2021; April 5, 2021; April 19, 2021; May 3, 2021; May 17, 2021; May 27, 2021; and June 14, 2021, the Department issued orders paying time-loss compensation based upon the final and binding wage rate order of September 6, 1995.
 12. Ms. Richardson-Greenan timely appealed the 2019, 2020, and 2021 time-loss compensation orders. The 2019, 2020, and 2021 appeals are of orders that are identical to the Department's final order of September 6, 1995, in terms of subject matter, cause of action, persons and parties, and the quality of person for or against who the claim is made.
 13. The 2019, 2020, and 2021 appeals are of orders that are identical to those addressed by the Board's September 15, 2009 final Decision and Order Adopting the Proposed Decision and Order dated July 27, 2009, in terms of subject matter, cause of action, persons and parties, and the quality of person for or against who the claim is made.
 14. Applying the doctrines of *res judicate* and collateral estoppel in these appeals would not work an injustice against Ms. Richardson-Greenan.
 15. The pleadings and evidence submitted by the parties demonstrate that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
 2. The doctrines of *res judicata* and collateral estoppel prevent the claimant from attempting to relitigate the issues of the time-loss compensation rate in these appeals.

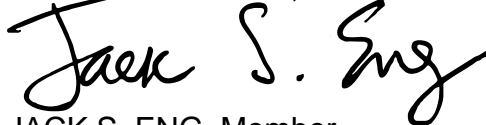
- 1 3. The Department is entitled to a decision as matter of law pursuant to Civil
2 Rule 56.
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4 4. The dismissal order issued by the Board on June 4, 1997, is final and
5 binding.
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7 5. The order issued by the Board on September 15, 2009, in which the Board
8 adopted the July 27, 2009 Proposed Decision and Order of Industrial
9 Appeals Judge Jeffrey Burkhardt is final and binding.
10
11 6. The Department orders dated July 24, 2019; December 2, 2019;
12 December 16, 2019; January 13, 2020; January 27, 2020;
13 February 24, 2020; March 9, 2020; March 23, 2020; April 6, 2020;
14 April 20, 2020; May 4, 2020; May 18, 2020; June 1, 2020; June 15, 2020;
15 June 29, 2020; July 27, 2020; August 10, 2020; August 24, 2020;
16 September 3, 2020; September 21, 2020; October 5, 2020;
17 October 19, 2020; October 19, 2020; November 2, 2020;
18 November 16, 2020; November 30, 2020; December 14, 2020;
19 December 14, 2020; December 28, 2020; January 11, 2021;
20 January 25, 2021; February 8, 2021; February 22, 2021; March 8, 2021;
21 March 22, 2021; April 5, 2021; April 19, 2021; May 3, 2021; May 17, 2021;
22 May 27, 2021; and June 14, 2021 are affirmed.

23 Dated: January 31, 2023.

24 BOARD OF INDUSTRIAL INSURANCE APPEALS

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26 HOLLY A. KESSLER, Chairperson

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28 JACK S. ENG, Member

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34 **DISSENT**

35 Because there is a genuine issue of material fact in this case, summary judgment as a matter
36 of law is contrary to the law.

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38 "A genuine issue of material fact exists where reasonable minds could differ on the facts
39 controlling the outcome of the litigation."¹⁶

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41 The Department argues that because Ms. Richardson-Greenan failed to appeal her wage
42 order within 60 days of its issuance it became final and binding and she is forever foreclosed from
43 requesting an adjustment to her wage rate. The Department has a short memory, however, because
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47 ¹⁶ *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552 (2008).

1 it was the Department that attacked a "res judicata" order in the seminal case on RCW 51.32.240,
2 *Birrueta v Department of Labor & Industries*.¹⁷ In that case the wage order had long been final and
3 binding, but the Department changed the wage rate upon learning during a pension review that
4 Mr. Birrueta was single rather than married, although it had been paying him as married for the entire
5 life of the claim. Mr. Birrueta appealed, arguing that the wage order was res judicata and could not
6 be changed. The Department argued that under RCW 51.32.240 it had the authority to change the
7 wage rate because the error was one of the enumerated reasons under that statute, innocent
8 misrepresentation. The Department prevailed. The Court stated, "The plain language of
9 RCW 51.32.240 clearly shows that the applicable time limit for seeking recoupment or an adjustment
10 of benefits **depends on the reason for the erroneous payment**."¹⁸ (Emphasis added.)

11
12 The Supreme Court was careful to point out that since a legislative amendment to
13 RCW 51.32.240 in 1999, the claimant could also use the statute to recover underpaid benefits as
14 long as the reason for the error was clerical error, mistake of identity, or innocent misrepresentation.

15
16 It was not until 1999 that the legislature amended the statute to provide a means
17 for a worker to recover underpaid benefits. Laws OF 1999, ch. 396, § 1(2);
18 It did so in direct response to this court's holding that "[t]he failure to appeal an
19 order, even one containing a clear error of law, turns the order into a final
20 adjudication, precluding any reargument of the same claim." *Marley v. Dep't of*
21 *Labor & Indus.*, 125 Wash.2d 533, 538, 886 P.2d 189 (1994); see HOUSE
22 COMMERCE & LABOR COMM., H.B. ANALYSIS ON H.B. 1894, at 1, 56th Leg.,
23 Reg. Sess. (Wash. 1999), Testimony supporting the 1999 amendment shows that
24 it was intended to achieve parity between a worker's rights to recover
25 underpayments and the Department's rights to recoup overpayments:
26 The Department of Labor and Industries is permitted to recoup benefits that are
27 overpaid, but when workers are underpaid benefits because of errors, they have
28 no recourse if the appeal period has expired. This is unfair and must be corrected
29 This bill would provide the same one-year period for workers to recover
30 underpaid benefits as the department has to recoup overpaid benefits.¹⁹

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32 Later in the decision the Supreme Court reiterated that this right to recoup benefits extended
33 to claimants as well as the Department: "In resolving this case, we are mindful that the parallel
34 structure of RCW 51.32.240(1)-(2) means that our decision is likely to affect the rights of workers to
35 seek adjustment of underpaid benefits, in addition to the Department's authority to recoup overpaid
36 benefits."²⁰

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45 ¹⁷ 186 Wn.2d 537 (2016).

46 ¹⁸ *Birrueta*, at 545.

47 ¹⁹ *Birrueta*, at 549-550.

²⁰ *Birrueta*, at 554.

1 Case law is law created by courts in the absence of statutory law, not in spite of it. The
2 Supreme Court followed its and other court's precedents in *Marley* when it determined that even an
3 erroneous decision was binding on the parties if not appealed in a timely manner. The Legislature
4 reacted to that ruling by changing the law and allowing a limited number of situations in which the
5 claimant could request a change to their wage rate even after the 60-day time limit to appeal the
6 wage order had passed. In *Birrueta* the Court rightfully recognized that in amending the statute, the
7 Legislature was putting a limit on the application of res judicata by the courts in very specific
8 circumstances.

9 In this case, there has been no consideration of the reason behind the incorrect wage rate for
10 Ms. Richardson-Greenan. Consequently, it cannot be found to be res judicata as a matter of law
11 without any evidence as to whether **the reason** for the incorrect wage is an adjudicator error or one
12 of the three types of errors under RCW 51.32.240 that allow a claimant to partially recoup
13 underpayments. If it is determined that the error is an adjudicator error, then the majority's arguments
14 on res judicata and collateral estoppel are well placed. But, if the error is one of the enumerated
15 reasons in RCW 51.32.240, the majority's argument is misplaced because the statute was created
16 to enable parties to fix a mistake made in the original wage order by attacking a later payment order
17 even after the wage order was final and binding. In this case, Ms. Richardson Greenan has attacked
18 several payment orders just as the Supreme Court stated in *Birrueta* a claimant has a right to do.

19 I would reverse and remand for the taking of evidence with regard to the reason for the
20 erroneous payment to determine if Ms. Richardson-Greenan can recoup underpaid benefits under
21 RCW 51.32.240. The majority asserts that Ms. Richardson-Greenan's wages weren't miscalculated
22 due to a clerical error, but that is a determination that is outside the purview of the majority. "In ruling
23 on a motion for summary judgment, the court's function is to determine whether a genuine issue of
24 material fact exists, not to resolve any existing factual issue."²¹

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²¹ *Balise v. Underwood*, 62 Wash. 2d 195, 199 (1963).

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**Addendum to Decision and Order
In re Lee A. Richardson-Greenan**

**Docket Nos. 19 23798, 20 11899, 20 11990, 20 11991, 20 11992, 20 14934, 20 14935, 20 14936,
20 14937, 20 14938, 20 14939, 20 15030, 20 17632, 20 17633, 20 17634, 20 20230, 20 20231,
20 20232, 20 20233, 20 27533, 20 27534, 20 27535, 20 28336, 20 28337, 20 28338, 20 28339,
20 28430, 21 11532, 21 11533, 21 11534, 21 11536, 21 11537, 21 14131, 21 14132, 21 14133,
21 14134, 21 16992, 21 16993, 21 16994, 21 16995 & 21 17090
Claim No. P-164786**

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Appearances

Claimant, Lee A. Richardson-Greenan, by Palace Law, per Jordan L. Couch

Employer, Bacou Dalloz USA (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Inwoo Lee

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Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on December 1, 2021, in which the industrial appeals judge affirmed the orders of the Department dated July 24, 2019; December 2, 2019; December 16, 2019; January 13, 2020; January 27, 2020; February 24, 2020; March 9, 2020; March 23, 2020; April 6, 2020; April 20, 2020; May 4, 2020; May 18, 2020; June 1, 2020; June 15, 2020; June 29, 2020; July 27, 2020; August 10, 2020; August 24, 2020; September 3, 2020; September 21, 2020; October 5, 2020; October 19, 2020; October 19, 2020; November 2, 2020; November 16, 2020; November 30, 2020; December 14, 2020; December 14, 2020; December 28, 2020; January 11, 2021; January 25, 2021; February 8, 2021; February 22, 2021; March 8, 2021; March 22, 2021; April 5, 2021; April 19, 2021; May 3, 2021; May 17, 2021; May 27, 2021; and June 14, 2021. The Department filed a response to the Petition for Review on October 21, 2022.