

Yost, Rick Sr.

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

Department orders referring only to a "date of injury" do not clearly establish the "date of manifestation" of an occupational disease and are not considered as res judicata with respect to the date of manifestation.*In re Rick Yost, Sr., BIIA Dec., 01 24199 (2003)*

Time-loss compensation benefits

A worker may be eligible for time-loss compensation benefits or loss of earning power benefits from the date of manifestation of an occupational disease.*In re Rick Yost, Sr., BIIA Dec., 01 24199 (2003)*

RES JUDICATA

Ambiguous orders

Department orders referring only to a "date of injury" do not clearly establish the "date of manifestation" of an occupational disease and are not considered as res judicata with respect to the date of manifestation.*In re Rick Yost, Sr., BIIA Dec., 01 24199 (2003)*

Time-loss compensation

Wages at time of injury

Prior litigation over entitlement to time-loss compensation benefits for a specific period precludes subsequent litigation over loss of earning power benefits for the same period.*In re Rick Yost, Sr., BIIA Dec., 01 24199 (2003)*

TIME-LOSS COMPENSATION (RCW 51.32.090)

Eligibility

A worker may be eligible for time-loss compensation benefits or loss of earning power benefits from the date of manifestation of an occupational disease.*In re Rick Yost, Sr., BIIA Dec., 01 24199 (2003)*

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: RICK C. YOST, SR.) DOCKET NO. 01 24199**
2)
3 **CLAIM NO. N-568706) ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING APPEAL**
5) **FOR FURTHER PROCEEDINGS**
6

7 **APPEARANCES:**

8
9 Claimant, Rick C. Yost, Sr., by
10 Hanemann, Bateman & Jones, per
11 James E. Keech

12
13 Employer, Various,
14 None

15
16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 William Andrew Myers, Assistant
19

20 This is an appeal filed by the claimant, Rick C. Yost, Sr., on December 7, 2001, with the
21 Board of Industrial Insurance Appeals from an order of the Department of Labor and Industries
22 dated December 3, 2001, which affirmed a Department order dated October 31, 2001. The
23 October 31, 2001 Department order closed the claim because medical records indicated that
24 treatment was concluded. **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**
25

26
27 **DECISION**
28

29 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
30 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
31 issued on September 30, 2002, in which the order of the Department dated December 3, 2001, was
32 affirmed.
33

34
35 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
36 no prejudicial error was committed. The rulings are affirmed. We remand this matter, however, so
37 that evidence may be presented as to the date of manifestation of Mr. Yost's industrially related
38 condition, and as to his entitlement to time loss compensation or loss of earning power
39 compensation.
40

41
42 We will recite the facts only insofar as they are necessary to this determination. Rick C.
43 Yost, Sr. is a 56-year-old man possessing a high school education. His work history consists of
44 work in all aspects of the drywall industry; hanging drywall, estimating for drywall jobs, and the
45 general duties involved in running a drywall business. From 1982 through 1992, he and his wife
46
47

1 owned a drywall business. Mr. Yost testified that his wife was the bookkeeper and he performed or
2 hired the labor. However, Mr. Yost has not hung drywall since 1989 or 1990, due to his neck
3 condition.
4

5 Mr. Yost has had previous claims, and in 1992 he had a neck injury for which he was paid a
6 permanent partial disability award equal to 18 percent. He also had a heart attack in 1996, which
7 he feels was related to an unusual increase in stress.
8
9

10 On January 19, 1996, Mr. Yost filed this claim for an occupational disease, alleging that he
11 had an occupational disease of cervical degenerative disc disease, arising out of his work hanging
12 drywall. This claim was initially rejected, which was then appealed to the Board, thus precipitating
13 the first of three Proposed Decisions and Orders in this matter. The Department order rejecting the
14 claim was dated June 27, 1997, and it affirmed a prior order dated February 7, 1997. At the top
15 right hand corner, both orders stated: "INJURY DATE 10/13/1994."
16
17
18

19 In the first appeal, our industrial appeals judge issued a Proposed Decision and Order
20 allowing this claim as an occupational disease, that of aggravation or acceleration of a pre-existing
21 degenerative disease condition of the cervical and thoracic spine. The order did not include any
22 reference to date of manifestation. On July 27, 1998, the Department issued a ministerial order that
23 embodied the decision contained in the Proposed Decision and Order. While the parties did not
24 include a copy of this order for the record, a review of the Department record done pursuant to *In re*
25 *Mildred Holzerland*, BIIA Dec., 15,729 (1965), reveals at the top right hand of the page, the words
26 "INJURY DATE 7/18/1995." This order was not appealed and became final.
27
28
29
30

31 On March 31, 2000, the Department issued an order denying time loss compensation
32 benefits for the period July 19, 1995 through March 30, 2000. This was appealed as well, and the
33 same industrial appeals judge issued a Proposed Decision and Order affirming the Department
34 order. Finally, on October 31, 2001, the Department issued an order closing the claim with no
35 permanent partial disability award. The appeal from this order is the subject matter of this appeal.
36
37
38

39 Before any hearings, however, the Department moved in limine to preclude the claimant
40 from presenting evidence as to the date of manifestation and as to either time loss compensation
41 benefits or loss of earning power benefits for the period of January 22, 1991 through October 31,
42 2001. The Department did so based on the claimant's assertion that he would seek to litigate the
43 date of manifestation and establish that the occupational disease became manifest in 1989,
44 although a claim was not filed until 1996. This date is crucial, as Mr. Yost contends that he may
45 allege entitlement to time loss compensation from the date of manifestation forward.
46
47

1 In its Motion in Limine, the Department relied on the fact that the July 27, 1998 ministerial
2 order had the words "INJURY DATE 7/18/1995" in support of its position that the issue of date of
3 manifestation was res judicata, and could not be raised. The claimant alleges that his degenerative
4 disc disease was at least partially disabling as of this date, and he was seeking treatment for it.
5 Thus, he seeks to litigate entitlement to time loss compensation or loss of earning power benefits
6 for the period of January 22, 1991 through July 18, 1995, as well as the period of March 31, 2000
7 through December 3, 2001.
8
9

10
11 Our industrial appeals judge granted the Department's Motion in Limine, which precluded the
12 parties from litigating the date of manifestation, as well as time loss compensation or loss of earning
13 power benefits from any date earlier than July 18, 1995. The claimant, in his Petition for Review,
14 argues that the fact that the Department issued a ministerial order which had "DATE OF INJURY
15 7/18/1995" is simply insufficient, pursuant to *In re Louise Scheeler*, BIIA Dec., 89 0609 (1990), to
16 notify him that the issue of date of manifestation was being decided in that order. He argues that if
17 he could establish a date of manifestation prior to January 22, 1991, he could seek time loss
18 compensation or loss of earning power benefits thereafter. Finally, while Mr. Yost he concedes that
19 the issue of entitlement to time loss compensation for the period of July 19, 1995 through March 30,
20 2000, is res judicata, as this has previously been litigated, the issue of entitlement to loss of earning
21 power benefits, however, was **not** litigated and he can now raise this issue. While we disagree with
22 the claimant as to whether he can now raise the issue of entitlement to loss of earning power
23 benefits for the period of July 19, 1995 through March 30, 2000, we agree that he should not be
24 precluded from presenting evidence and litigating the date of manifestation. Further, we agree that
25 he should be able to contend entitlement to time loss compensation for the period of January 22,
26 1991 through July 18, 1995.
27
28

29 The threshold issue in this matter, then, is whether the July 27, 1998 ministerial order should
30 be accorded res judicata effect as to the date of manifestation. The doctrine of res judicata
31 prohibits litigation of claims that could have been litigated in a prior action. That doctrine applies
32 equally to a final adjudication issued by the Department of Labor and Industries. Under the doctrine
33 of res judicata, an appeal is barred if it is identical in subject matter, cause of action, persons and
34 parties, and the quality of the persons for or against whom the action is taken. *Somsak v. Criton
35 Techs./Heath Tecna, Inc.*, 113 Wn. App. 84, 92 (2002). (Citations omitted.)
36
37
38
39
40
41
42
43
44
45
46
47

1 However, before a party can be precluded by principles of res judicata from litigating a
2 specific issue at a later time, the party must have had clear and unequivocal notice of issues
3 adjudicated by the prior order, so that the party has had an opportunity to challenge the specific
4 finding. *King v. Department of Labor & Indus.*, 12 Wn App. 1 (1974). Indeed, we have held on
5 several occasions that an order of the Department will not be held to have a res judicata effect
6 unless it specifically apprises the parties of the determinations being made. See *In re Lyssa Smith*,
7 BIIA Dec., 86 1152 (1988); *In re Gary Johnson*, BIIA Dec., 86 3681 (1987).

8
9
10 In this matter, the Department argues that a ministerial order containing a date identified as
11 the "date of injury" should be accorded res judicata effect as to the date of manifestation. We note
12 that the Proposed Decision and Order in this matter determined that this claim should be allowed as
13 an occupational disease, but made no reference to either a date of injury or a date of manifestation.
14 A ministerial order ordinarily is one that takes no action other than that directed in the Proposed
15 Decision and Order (or Decision and Order). Yet, in the July 27, 1998 order (referred to in that very
16 order as being issued pursuant to Board order), the Department order contained reference to a date
17 of injury, a date different than that in any of the previous orders. Clearly, then, the July 27, 1998
18 order is more than ministerial; it seeks to adjudicate the date of manifestation as well.

19
20 Moreover, we are troubled by the fact that the date is not set forth in the body of the order;
21 rather, it is contained in the "boilerplate" usually reserved for identifying information. Finally, while a
22 date of manifestation is likened to a date of injury, we question whether this reference to "date of
23 injury" adequately apprises an occupational disease claimant that the date is that of the date of
24 manifestation. Thus, the July 27, 1998 order, which by its own terms purported to be ministerial,
25 was clearly **not** ministerial. Moreover, the determination was placed in a part of the order usually
26 reserved for identifying information. Under the circumstances, we cannot determine that the
27 claimant was clearly and unambiguously apprised that the issue of date of manifestation was being
28 adjudicated in the July 27, 1998 order. Thus, we will not accord res judicata effect to the order of
29 July 27, 1998, relative to the issue of date of manifestation.

30
31 Having determined that the July 27, 1998 order has no res judicata effect relative to the
32 issue of date of manifestation, we must now determine whether the claimant may use this date as
33 the starting point for entitlement to time loss compensation benefits. We begin with the observation
34 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
35 compensation benefits is a question of law. We begin with the observation
36 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
37 compensation benefits is a question of law. We begin with the observation
38 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
39 compensation benefits is a question of law. We begin with the observation
40 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
41 compensation benefits is a question of law. We begin with the observation
42 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
43 compensation benefits is a question of law. We begin with the observation
44 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
45 compensation benefits is a question of law. We begin with the observation
46 that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss
47 compensation benefits is a question of law. We begin with the observation

1 compensation, is not addressed in either the statute or by regulation. RCW 51.32.090(5) provides,
2 in pertinent part, that
3

4 No worker shall receive compensation for or during the day on which
5 injury was received or the three days following the same, unless his or
6 her disability shall continue for a period of fourteen consecutive calendar
7 days from date of injury: . . .
8

9
10 However, an occupational disease differs from an industrial injury in that there is no sudden and
11 tangible happening, producing an immediate or prompt result (see RCW 51.08.100). When a
12 worker suffers an injury, such as a fall, there is a definite point in time at which the industrial
13 insurance statute is applicable. With an occupational disease, however, there is no such point in
14 time, and it becomes necessary to determine at what point the claimant may allege entitlement to
15 time loss compensation.
16
17

18 RCW 51.32.180 mandates that every worker suffering disability from an occupational
19 disease is to receive the same compensation as would be paid to a worker injured or killed in
20 employment under Title 51. This Board has previously analyzed this precept in relation to the
21 determination of the applicable schedule of benefits in occupational disease cases. The applicable
22 schedule of benefits in an industrial injury case is that in effect at the time of injury; however, as
23 noted above, there is no such definite time in an occupational disease case. In 1988, the
24 Legislature amended RCW 51.32.180 to provide that the rate of compensation for occupational
25 diseases shall be established as of the date the disease requires medical treatment or becomes
26 totally or partially disabling, whichever comes first, and without regard to the date of contraction of
27 the disease or date of filing the claim. This is essentially a codification of the so-called "date of
28 manifestation" rule, set forth by this Board in the case of *In re Robert Wilcox*, BIIA Dec., 69,954
29 (1986).
30
31
32
33
34
35

36 In *Wilcox*, we addressed the issue of which schedule of benefits to use in a matter involving
37 asbestos related cancer. Citing to the mandate in RCW 51.32.180, we held that
38

39 Workers suffering injury and sustaining occupational disease are
40 compensated equally only when benefits for occupational disease are
41 paid in accordance with schedules in effect when illness becomes
42 manifest.
43

44 *Wilcox*, at 5-6.
45
46
47

1 Certainly, the *Wilcox* matter, as well as the statute, concerned the means to determine the
2 appropriate schedule of benefits. Nonetheless, we believe this analysis is equally applicable to the
3 determination of eligibility for time loss compensation. In so holding, we must emphasize the fact
4 that entitlement to time loss compensation remains, as always, dependent upon certification by a
5 physician that the claimant is totally, temporarily disabled, proximately caused by the allowed
6 occupational disease. Our holding herein concerns only the earliest date the claimant can allege
7 entitlement to time loss compensation benefits.
8
9

10
11 It is our belief that the date of manifestation rule, as codified by RCW 51.32.180, is most
12 comparable to the date of injury in an industrial injury case. As we observed in *Wilcox*,

13
14 With a traumatic injury, a worker immediately suffers medical problems
15 requiring treatment. With occupational disease, its character as a
16 medical problem and/or disability producer only occurs with
17 manifestation.
18

19 *Wilcox*, at 5.
20

21 Accordingly, we hold that a claimant with an allowed occupational disease may contend
22 entitlement to time loss compensation as of the date the occupational disease becomes manifest.
23 As always, time loss compensation will be paid only when the claimant provides medical
24 certification that he or she is totally, temporarily disabled, proximately caused by the occupational
25 disease.
26
27

28 Finally, we turn to the issue of whether Mr. Yost can litigate his entitlement to loss of earning
29 power benefits for a period of time that had previously been the subject of litigation for entitlement
30 to time loss compensation benefits. We note that on March 31, 2000, the Department issued an
31 order denying payment of time loss compensation benefits for the period of July 19, 1995 through
32 March 30, 2000. This order was appealed by the claimant, and was the subject of litigation. A
33 review of the Proposed Decision and Order relative to this appeal reveals that the sole issue was
34 entitlement to time loss compensation benefits during this period; no findings were made relative to
35 entitlement to loss of earning power benefits nor was this issue identified. The Proposed Decision
36 and Order affirmed the Department order, and the claimant's Petition for Review was denied.
37
38
39
40
41

42 Although the claimant concedes that the issue of his entitlement to time loss compensation
43 during the period of July 19, 1995 through February 30, 2000, is barred by *res judicata*, he
44 contends that he can now assert entitlement to loss of earning power benefits during this same
45 period. We hold, however, that he may not litigate this issue, based on principles of *res judicata*.
46
47

1 The doctrine of res judicata not only precludes litigation of matters that have previously been
2 the subject of a final order, it can also act to preclude litigation of issues that **might** have been
3 raised.
4

5 The general term res judicata encompasses claim preclusion (often itself
6 called res judicata) and issue preclusion, also known as collateral
7 estoppel. Under the former a plaintiff is not allowed to recast his claim
8 under a different theory and sue again. Where a plaintiff's second claim
9 clearly is a new, distinct claim, it is still possible that an individual issue
10 will be precluded in the second action under the doctrine of collateral
11 estoppel or issue preclusion. In an instance of claim preclusion, all
12 issues which **might** have been raised and determined are precluded.
13

14 *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507 (1987). (Emphasis ours.) Indeed, an unappealed
15 order that has become final precludes litigation of issues encompassed within the terms of the
16 order, *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162, 169 (1997), even though none of
17 the issues were actually litigated. Precluding litigation of issues that might have been raised avoids
18 piecemeal litigation, and promotes judicial economy. As our Supreme Court has observed, "The
19 doctrine of claim preclusion prohibits claim splitting as a matter of policy, primarily in order to
20 conserve judicial resources and to ensure repose for parties who have already responded
21 adequately to the plaintiff's claims." *Babcock v. State*, 112 Wn.2d 83, 93 (1989).
22

23 Under res judicata, an appeal is barred if it is identical in subject matter, cause of action,
24 persons and parties, and the quality of the persons for or against whom the action is taken.
25 *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763 (1995). Here, there is no question but that the
26 parties are identical, as is the quality of the persons for or against whom the action is taken. The
27 cause of action, that is, the claim itself, is also the same. The issue is whether the claim is identical
28 in subject matter. Placing this issue in context, it is whether a party must raise the issue of
29 entitlement to loss of earning power benefits in litigation concerning entitlement to time loss
30 compensation benefits, or face claim preclusion if he or she fails to do so.
31

32 The Industrial Insurance Act does not contain the term "loss of earning power." Loss of
33 earning power benefits are referred to as "partial time loss compensation" in the definitions
34 contained in the regulation defining terms used. See WAC 296-20-01002. Loss of earning power
35 benefits are also described as reduced or partial time loss compensation. See *Hubbard v.*
36 *Department of Labor & Indus.*, 140 Wn.2d 35, at 43 (2000). Both loss of earning power benefits
37
38
39
40
41
42
43
44
45
46
47

1 and time loss compensation benefits are essentially a wage replacement. Most importantly, for our
2 purposes here, the evidence used to establish entitlement to either form of compensation is virtually
3 the same. Both types of compensation require the testimony of a physician, as well as, testimony
4 of the claimant himself or herself. They differ only in that time loss compensation represents a total
5 lack of earning power; loss of earning power represents a partial restoration of earning power.
6 Indeed, they are so similar that concepts of judicial economy require that a claimant seeking to
7 establish entitlement to time loss compensation must also litigate his or her entitlement to loss of
8 earning power benefits, or face preclusion of that claim at a later point.
9

10
11
12
13 Certainly, we are aware that *res judicata*, or claim preclusion, is somewhat complicated by
14 the unique nature of an industrial insurance appeal. Specifically, this Board has appellate
15 jurisdiction only, and may only consider those matters which have first been passed on by the
16 Department. *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956). Indeed, the claimant
17 argues that the prior litigation was an appeal from an order denying time loss compensation, and
18 that in issuing that order, the Department did not pass on entitlement to time loss compensation.
19 He argues that as such, the Board lacks jurisdiction to consider entitlement to loss of earning power
20 in an appeal from an order denying time loss compensation. This, however, is not the case.
21 Entitlement to loss of earning power benefits is routinely litigated in appeals from orders denying
22 time loss compensation. See *In re Peter S. Kim*, Dckt. No. 00 21147 (August 8, 2002). As noted
23 above, both types of benefits are a wage replacement, and a denial of either constitutes a denial of
24 wage replacement benefits.
25

26
27
28
29
30
31 We are vacating the Proposed Decision and Order and remanding this matter for the taking
32 of testimony relative to the date of manifestation of the claimant's occupational disease, as well as
33 evidence relative to entitlement to loss of earning power benefits or time loss compensation
34 benefits for periods other than July 19, 1995 through March 30, 2000.
35

36
37 The Proposed Decision and Order dated September 30, 2002, is vacated. This matter is
38 remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as
39 indicated by this order. The parties are advised that this order is not a final Decision and Order of
40 the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the
41 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on
42 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as
43 to each contested issue of fact and law, based on the entire record, and consistent with this order.
44
45
46
47

