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

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

APPEARANCES:

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

Employer, Various,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
William Andrew Myers, Assistant

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

DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Having determined that the July 27, 1998 order has no res judicata effect relative to the issue of date of manifestation, we must now determine whether the claimant may use this date as the starting point for entitlement to time loss compensation benefits. We begin with the observation that the issue of when a worker, filing a claim for occupational disease, is eligible for time loss

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

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

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

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

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

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

Wilcox, at 5-6.

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

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

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

Wilcox, at 5.

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

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

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

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

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

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

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

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

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

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

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

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

Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 23rd day of April, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member