

## **Soden, Lisa**

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### **COLLATERAL ESTOPPEL**

#### **Superior court judgment in unrelated case**

The Department was not barred from defending the constitutionality of a statute (RCW 51.08.178) even though a superior court in an unrelated case in which the Department was a party had previously held the statute unconstitutional. Since neither the claimant nor her employer were parties to the other action, the doctrine of collateral estoppel was held inapplicable. ....*In re Lisa Soden, BIIA Dec., 85 2993 (1987)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

### **STARE DECISIS**

Unpublished opinions of superior courts are not part of the state's common law and have no precedential value or binding effect. ....*In re Lisa Soden, BIIA Dec., 85 2993 (1987)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

### **TIME-LOSS COMPENSATION (RCW 51.32.090)**

#### **Wages (RCW 51.08.178) - Compensation**

Meals supplied by the employer are "wages" for purposes of computing the rate of time-loss compensation. ....*In re Lisa Soden, BIIA Dec., 85 2993 (1987)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 87-2-05759-3.]

Scroll down for order.



1 The issues raised in this appeal both involve RCW 51.08.178. That statute provides, in  
2 pertinent part:  
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4 The term "wages" shall include the reasonable value of board, housing,  
5 fuel, or other consideration of like nature received from the employer, but  
6 shall not include overtime pay, tips, or gratuities....  
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8 The first issue before us is whether the Department properly excluded the reasonable value of meals  
9 provided to Ms. Soden by her employer in computing her wages. The Department argues that in the  
10 absence of statutory or case law definition, it has reasonably interpreted the word "board" to mean  
11 more than just the furnishing of meals in order to be considered a part of a worker's wages. It asserts  
12 that such meals are not wages unless they are furnished in conjunction with housing or lodging and  
13 that they are otherwise a mere gratuity provided by the employer.  
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15 Since the Doubletree Motor Hotel reported the value of the meals provided to Ms. Soden to the  
16 Internal Revenue Service as wages, it appears that they were, in fact, part of her pay.  
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18 Furthermore, from the statute, we can discern no reason for the Department's interpretation.  
19 The statute specifies that wages include "board" and "housing" as separate and distinct forms of  
20 remuneration. "Board" is food or meals. "Housing" is a place to live. Webster's II New Riverside  
21 University Dictionary (1984). The statute clearly evidences a legislative intent that meals alone may  
22 be the equivalent of wages. The value of the meals provided Ms. Soden should be included in the  
23 wage base used for the computation of time-loss compensation.  
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25 Regarding the second issue before this Board, the claimant advances several arguments in  
26 support of her position that tips and gratuities she received should have been included in computing  
27 her wages, in spite of the unambiguous language in RCW 51.08.178 which excludes them. She  
28 contends that insofar as the statute excludes tips and gratuities, it is unconstitutional and in violation of  
29 the Equal Protection Clause of the United States Constitution.  
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31 Ms. Soden concedes that this Board cannot directly rule on the constitutionality of RCW  
32 51.08.178. "An administrative body does not have authority to determine the constitutionality of the  
33 law it administers; only the courts have that power." Bare v. Gorton, 84 Wn.2d 380, 383 (1974). The  
34 claimant argues, however, that the doctrine of collateral estoppel bars the Department from litigating  
35 the constitutionality of the statute since it was a party to Welch v. Department of Labor and Industries,  
36 Spokane County Superior Court No. 85-20182708, in which said Superior Court declared the statute  
37 unconstitutional. The Department did not appeal the Superior Court's decision.  
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1 The elements of the doctrine of collateral estoppel are set forth in Bordeaux v. Ingersoll Rand  
2 Company, 71 Wn.2d 392, 395 (1967):

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4 Res judicata and collateral estoppel, kindred doctrines designed to prevent  
5 relitigation of already determined causes and curtail multiplicity of actions  
6 and harassment in the courts, are at times indistinguishable and frequently  
7 interchangeable. If the differences must be noted, it could be said that res  
8 judicata is the more comprehensive document, identifying a prior judgment  
9 arising out of the same cause of action between the same parties,  
10 whereas collateral estoppel relates to and bars relitigation on a particular  
11 issue or determinative fact. Both the doctrines require a large measure of  
12 identity as to parties, issues and facts, and in neither can the party urging  
13 the two doctrines as a defense be a stranger to the prior proceeding. He  
14 must have been a party, a participant, or in privity with either, and the  
15 action out of which the bar is claimed must be qualitatively the same as  
16 the case in which the doctrine is set up as a bar. While res judicata  
17 precludes relitigation of an entire cause because of an identity of parties  
18 and issues culminating in a judgment, collateral estoppel is less inclusive,  
19 preventing retrial of but one or more of the crucial issues or determinative  
20 facts. Owens v. Kuro, 56 Wn.2d 564 (1960); Riblet v. Ideal Cement  
21 Company, 54 Wn.2d 779 (1959); 2 L. Orland, Wash. Prac., sec. 387 (2d  
22 ed., 1965).

23  
24 We recognized this principle in Owens v. Kuro, supra, when we said: a  
25 judgment is not res judicata nor is one collaterally estopped by judgment in  
26 a later case if there is no identity or privity of parties in the same  
27 antagonistic relation as in the decided action. Riblet v. Ideal Cement  
28 Company, 54 Wn.2d 779, 345 P.2d 173; Rufener v. Scott, 46 Wn.2d 240,  
29 280 P.2d 253. An estoppel must be mutual and cannot apply for or  
30 against a stranger to a judgment since a stranger's rights cannot be  
31 determined in his absence from the controversy.

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33 The instant case is not within the venue of Spokane County and neither Ms. Soden nor the  
34 Doubletree Motor Hotel were parties to the Welch case. Accordingly, the doctrine of collateral  
35 estoppel has no application to benefit this claimant, nor can it bind her employer.

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37 Finally, the claimant argues that this Board should utilize the Welch decision as stare decisis.  
38 This argument is untenable. State v. Fitzpatrick, 5 Wn. App. 661 (1971) held that unpublished  
39 opinions of the Court of Appeals do not become part of the common law of the state of Washington,  
40 are not precedential, and should not be considered in the trial courts. Similarly, unpublished opinions  
41 of Superior Courts do not have precedential value to affect Washington's common law. It would be  
42 inappropriate for this Board to bind itself to the unappealed judgment in Welch. It is simply and solely  
43 the law of that case; it is not the law of this state. We are bound to apply RCW 51.08.178 according to  
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1 its clear language. The Department was correct in excluding tips and gratuities in its computation of  
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3 Ms. Soden's wages under the statute.

#### 4 **FINDINGS OF FACT**

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6 1. On August 29, 1983, the Department of Labor and Industries received an  
7 accident report from Lisa K. Soden in which she alleged she had  
8 sustained an injury on June 30, 1983, during the course of her  
9 employment with the Doubletree Motor Hotel. The claim was assigned  
10 Claim No. J-307824 by the Department. Thereafter, time-loss  
11 compensation was paid, and on October 21, 1985, the Department issued  
12 an order which provided: "It is determined that the original compensation  
13 rate of \$451.88 established on or about August 29, 1983, and based on  
14 claimant's reporting of wages of \$3.95 per hour at a full rate of 176 hours  
15 per month and verified by the employer, is correct and without error or  
16 omission as procedurally prescribed in RCW 51.08.178." On December 9,  
17 1985, the claimant filed a notice of appeal with the Board of Industrial  
18 Insurance Appeals from the Department's order of October 21, 1985. On  
19 January 8, 1986, this Board issued an order granting the appeal, assigning  
20 it Docket No. 85 2993, and directing that further proceedings be held.
- 21 2. On June 30, 1983, Lisa K. Soden sustained an injury during the course of  
22 her employment as a food service worker at the Doubletree Motor Hotel.
- 23 3. As a food service worker, Ms. Soden received \$3.95 per hour from her  
24 employer, as well as gratuities or tips from her customers. The claimant  
25 reported the amount of her tips to her employer on a daily basis.
- 26 4. The Doubletree Motor Hotel provided meals to its employees and required  
27 them to take a 40 minute break daily for such meals. Ms. Soden ate some  
28 of the meals provided.
- 29 5. The Doubletree Motor Hotel reported the amount of the hourly wage paid,  
30 gratuities or tips reported by Ms. Soden, and the value of meals provided  
31 by it, to the Internal Revenue Service as wages paid to Ms. Soden; and  
32 Ms. Soden's income taxes were computed based upon the total amount  
33 reported by the employer.
- 34 6. In computing the claimant's monthly wage pursuant to RCW 51.08.178,  
35 the Department did not include the value of tips received from customers,  
36 nor the reasonable value of meals provided to her by her employer.
- 37 7. On February 10, 1986, the Superior Court of the County of Spokane, State  
38 of Washington, entered an order in Welch v. Department of Labor and  
39 Industries, Cause No. 85-20182708. In that order, Judge James Murphy  
40 found that insofar as RCW 51.08.178 failed to include tips in the  
41 computation of the wage base, it was unconstitutional and in violation of  
42 the Equal Protection Clause of the United States Constitution. The  
43 Superior Court order became final when no further appeal was taken  
44 within the statutory period for such appeal.
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- 1 8. The issue before the Spokane County Superior Court in Welch, supra,  
2 was whether the Department properly excluded tips and gratuities in its  
3 computation of monthly wage under RCW 51.08.178.  
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5 9. The Department of Labor and Industries was a party to the litigation before  
6 the Superior Court of Spokane County, State of Washington, in Welch v.  
7 Department of Labor and Industries, Cause No. 85-20182708, but neither  
8 Ms. Soden nor the Doubletree Motor Hotel was a party to that action.

9 **CONCLUSIONS OF LAW**

- 10 1. The Board of Industrial Insurance Appeals has jurisdiction over the subject  
11 matter and the parties to this appeal.  
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13 2. Meals provided by the Doubletree Motor Hotel to Ms. Soden constituted  
14 "board" for purposes of computing her wages under RCW 51.08.178.  
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16 3. In spite of the decision of the Superior Court of Spokane County, State of  
17 Washington, in Welch v. Department of Labor and Industries, Cause No.  
18 85-20182708, the doctrine of collateral estoppel does not preclude the  
19 Department from litigating here the issue of whether the Department  
20 properly excluded tips and gratuities in its computation of wages under  
21 RCW 51.08.178, since neither Ms. Soden nor the Doubletree Motor Hotel  
22 was a party to that action.  
23  
24 4. Superior Court opinions do not have precedential value to affect the  
25 common law of this state, and do not bind this tribunal under the doctrine  
26 of stare decisis.  
27  
28 5. The order of the Department dated October 21, 1985, which stated, "it is  
29 determined that the original compensation of \$451.88 established on or  
30 about August 29, 1983, and based on claimant's reporting of wages of  
31 \$3.95 per hour at a full rate of 176 hours per month and verified by the  
32 employer, is correct and without error or omission as procedurally  
33 prescribed in RCW 51.08.178", is incorrect in part and should be reversed,  
34 and this claim remanded to the Department with directions to include the  
35 reasonable value of meals provided to Ms. Soden by the Doubletree Motor  
36 Hotel in its computation of the claimant's wages under RCW 51.08.178,  
37 and to take such further action as is indicated by the law or the facts.

38 It is so ORDERED.

39 Dated this 9th day of March, 1987.

40 BOARD OF INDUSTRIAL INSURANCE APPEALS

41  
42 /s/  
43 GARY B. WIGGS Chairperson

44  
45 /s/  
46 PHILLIP T. BORK Member  
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