Supreme Court No. 96189-1

Court of Appeals No. 76324-5-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

THE CITY OF EVERETT

Petitioner,

THE DEPARTMENT OF
LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW
CITY OF EVERETT

Pratt Day & Stratton, PLLC

Marne J. Horstman, # 27339
Attorneys for Petitioner,
City of Everett
2102 N. Pearl Street, Suite 106
Tacoma, Washington 98406
(253) 573-1441
Office ID No. OC641672

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I. IDENTITY OF PETITIONER

The Petitioner is the City of Everett (City), Respondent Michael Weaver's (Weaver) Self-insured Employer under RCW Title 51.

II. COURT OF APPEALS' DECISION

The City seeks review of the Court of Appeals, Division I's, Decision in *Weaver v. City of Everett*, __ Wn. App. __, 421 P.3d 1013 (2018).[1]

III. ISSUES PRESENTED

1. Did the Court of Appeals erroneously fail to apply RCW 51.52.110's mandate of finality, collateral estoppels, *res judicata* and established case law to the Board's final Decision?

2. Did the Court of Appeals erroneously bifurcate Weaver's claims into time loss and pension claims in determining lack of subject matter identity?

3. Did the Court of Appeals erroneously expand the application of equitable relief to the detriment of Washington's workers, employers, and the Department of Labor & Industries?

IV. STATEMENT OF THE CASE

This case involves Weaver's second attempt to get a workers' compensation claim allowed for melanoma. His first claim was denied by a final Board of Industrial Insurance Appeals' (Board) Decision that his melanoma did not arise naturally and proximately out of the distinctive conditions of his employment, and he did not establish a compensable occupational disease claim. CP 264. His second claim resulted in this appeal.

[1] A copy of the Opinion is contained in Appendix A.

First Action: Claim No. SG-15654

In 2011, Weaver filed a workers' compensation claim for melanoma, asserting it was caused by his employment as a firefighter with the City. CP 246. Prior to working for the City, he spent his youth in North Texas where he repeatedly had sunburns, joined the military, then spent three years as a guide in Montana. CP 264, 305. ARNP Sonja Wright examined a mole Mr. Weaver had for 20 years. Weaver related a history of at least five sunburns in his youth. ARNP Sandler did not recall Weaver advising her that he had a sunburn while in training for the City. CP 258.

Surgeon Byrd took 16 square inches of tissue from Weaver's back and took a lymph biopsy. CP 73, 285, 298. Treating oncologist Dr. David Aboulafia's impression was that Weaver had "a fairly significant cancer diagnosis that could affect his longevity." CP 127. Weaver had independent medical evaluations with Dr. Hackett, Board certified in internal medicine and dermatology, and Dr. Levenson, Board certified in medical oncology and hematology. CP 282-283, 293, 295-296. Both physicians diagnosed melanoma and determined that Weaver's melanoma was not caused by his employment for the City. CP 283, 293, 296, 306.

On January 3, 2012, the Department of Labor & Industries (Department) issued an order denying Weaver's claim because the condition was not an occupational disease. CP 251, 278. After obtaining the representation of Ron Meyers, an attorney experienced in litigating

firefighter cases, particularly cases involving RCW 51.32.185[2], he filed a Notice of Appeal to the Board contending the presumption of RCW 51.32.185 applied, and his melanoma was an occupational disease, assigned Board Docket No. 12 11709. CP 251. He testified under oath at his Board hearing conducted under the Rules of Superior Court and Rules of Evidence[3] regarding the work exposures he was asserting caused his melanoma. CP 375-393. He also presented the testimony of Texas witness Marcella Lancaster to testify about his lack of non-firefighter exposure and his own testimony and the testimony of Captain Richard Shraunder to testify about his exposures while employed by the City. CP 252-264, 361-374. He presented expert medical testimony of Kenneth Coleman, M.D., also a practicing attorney who often provides expert medical testimony, in support of his claim. CP 256, 327-359.[4,5]

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[2] Mr. Meyers represented claimants in *Boyd v. City of Olympia,* 1 Wn. App.2d 17, 403 P.3d 956 (2017); *Spivey v. City of Bellevue,* 187 Wn.2d 716, 389 P.3d 504 (2017); *Kimzey v. Dep't of Labor & Indus.,* 191 Wn. App. 1030, (2015)(not reported); *Gorre v. City of Tacoma,* 184 Wn.2d 30, 357 P.3d 625 (2015); *Larson v. City of Bellevue,* 188 Wn. App. 857, 355 P.3d 331 (2015)(later decided with Spivey); *Crane v. Dep't of Labor & Indus.,* 177 Wn. App. 1005 (2013)(not reported); *Jones v. City of Olympia,* 171 Wn. App. 614, 287 P.3d 687 (2012); *City of Bellevue v. Raum,* 171 Wn. App. 124, 286 P.3d 695 (2012); *McKeown v. City of Mountlake Terrace,* 169 Wn. App. 1039 (2012)(not reported).

[3] WAC 263-12-125.

[4] The Court speculates that Weaver did not call his treating oncologist to testify in the first action because of cost factors. Given the special consideration afforded treating physicians' opinions per *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 761 P.2d 618 (1988), fee limitations, and the availability of attorney and witness fees under RCW 51.32.185 had he prevailed, is that his treating oncologist's opinion regarding causation between Weaver's work and his melanoma was not favorable in the first action.

[5] At the September 11, 2012 hearing, Weaver waived presentation of his witnesses Pam Evans, Tony Patricelli, John Tanaka, and David Aboulafia, M.D. CP 252.

The Industrial Appeals Judge (IAJ) issued her Proposed Decision and Order affirming the Department's rejection of Weaver's claim for melanoma. There were no findings of fact or conclusions of law regarding treatment, time loss, pension or any other form of workers' compensation benefits because those issues were not issues in the appeal regarding the threshold determination of claim allowance. CP 253-264.

Weaver's Counsel filed a Petition for Review seeking to have the IAJ's Decision reversed and the claim allowed. CP 247. The Board denied review and adopted the IAJ's Decision as the Board's final Decision and Order. CP 265. Weaver and Mr. Meyers parted ways. Weaver filed an appeal to Snohomish County Superior Court, but failed to perfect his appeal, and ultimately his appeal was dismissed with prejudice, leaving the Board's Decision as the final decision. CP 122, 247-248. The City was required to expend resources to investigate and process Weaver's claim, proceed through the trial at the Board to defend the Department's order denying Weaver's claim, and proceed in Superior Court to have Weaver's appeal dismissed. There is no evidence in the record that Weaver was mentally incompetent to pursue his appeal.

Second Action: Claim No. SH-28667

Weaver's melanoma recurred. CP 128-129,284, 297. The cancer he has now is the same cancer. On July 18, 2014, Weaver filed a second claim for the same melanoma the Board had already concluded in a final decision was not related to his work for the City and was not an

occupational disease. CP 275.[6] The City asked Drs. Hackett and Levenson to review the additional records regarding the new claim. CP 275. Both physicians opined that the new findings were metastases of the original melanoma. CP 297, 284. On November 12, 2014, the Department denied the new claim because the claim was filed for the same cancer upon which the Department and Board had already passed in a final decision. CP 281. On January 8, 2015, Weaver filed a second appeal to the Board from the Department's denial of his claim, which the Board assigned Docket No. 15 10293, and which the City again had to expend resources and funds to defend. CP 271-272.

Drs. Hackett and Levenson reviewed additional records and opined that Weaver's cancer is the same cancer that was the subject matter of Weaver's prior claim for claim allowance and litigation of the Department's claim rejection. CP 284-285, 297-298. The City filed a Motion for Summary Judgment on the grounds that Weaver was precluded, as a matter of law, from relitigating the Board's final Decision rejecting his occupational disease claim for melanoma. CP 228-309.

Weaver, not satisfied with the failed results of his first action, changed his testimony by declaration, retained a different expert, and obtained a declaration from Dr. Aboulafia. CP 108-109, 134-166, 170-202. On December 7, 2015, the IAJ issued the Board's second Proposed Decision

[6] A condition rejected as an industrial injury or occupational disease by final Department or Board Order does not become work related if it gets worse. RCW 51.32.160 does not permit reopening of rejected claims. Weaver's second claim is a statutorily impermissible attempt to reopen a rejected claim.

and Order affirming the Department's rejection of the claim on the grounds that the prior Board Decision was final. CP 57-62. Weaver filed a Petition for Review. CP 5-24. On January 15, 2016, the Board issued an Order denying the Petition for Review and adopting the IAJ's Decision as the Board's Decision and Order. CP 3. Weaver appealed the Board's Decision to Snohomish County Superior Court. Judge Thomas Wynne issued a Decision on Administrative Appeal on December 15, 2016, affirming the Decision and Order of the Board, and on March 29, 2017, issued an Order and Judgment consistent with his Decision. CP 2, 26, 29, 30, 36. Weaver appealed to Division I of the Court of Appeals. CP 31, 36. The City requests review of Division I's fundamentally flawed Decision.[9]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

If the Court permits the Court of Appeals' Decision to stand, the workers' compensation system in Washington State will be turned on its head to the detriment of workers, employers, and the Department of Labor & Industries, and will result in interminable litigation before the Board and the Courts. The Department has original jurisdiction over all matters involving RCW Title 51, which provides the statutory mandates for workers' compensation insurance benefits. The fundamental threshold

[9] The Court erroneously states "[t]hat the Department and the City, each defending the superior court's ruling here at issue, do not agree as to the proper basis on which to affirm the superior court's decision informs our inquiry in this matter." *Decision* at 7, fn 5. The Department and City assert both doctrines apply to preclude relitigation of Weaver's claim. The Court forced the parties to choose one theory at oral argument, which should not be construed as a waiver of either argument by either party. Wash Court of Appeals oral argument, *Weaver v. City of Everett*, No. 76324-5-I (June 4, 2018)

question in any workers' compensation claim filed is whether the claim should be allowed or rejected. That determination turns on whether the claimant had an industrial injury or occupational exposure giving rise to a medical condition. The benefits to which the claimant may be entitled are not considered by the Department at this threshold juncture and are beyond the Board's and Court's appellate review.

The sole issue addressed by the Department's and Board's Orders in the prior appeal was claim allowance and application of RCW 51.32.185. CP 251, 278. The only issue litigated was whether Respondent Weaver's malignant melanoma arose naturally and proximately out of the distinctive conditions of employment such that his occupational disease claim should be allowed. The Court should grant review because the Decision of the Court of Appeals is in conflict with decisions of this Court, with other decisions of the Courts of Appeal, and with the Constitution of the State of Washington, and the Decision of the Court of Appeals raises issues of substantial public interest that should be determined by this Court. RAP 13.4(b).

1. THE COURT OF APPEALS FAILED TO FOLLOW THE STATUTORY MANDATE OF FINALITY OF RCW 51.52.110 AND ESTABLISHED CASE LAW.

a. The finality provisions of RCW 51.52.050 and RCW 51.52.110 are unambiguous.

RCW Title 51 is clear that the Department has original jurisdiction over workers' compensation claims. RCW 51.04.010; RCW 51.04.020;

Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 292 P.2d 865 (1956). The Legislature created the Board, a quasi-judicial agency, to decide appeals from Department orders. RCW 51.52.010; RCW 51.52.020. *LeBire v. Dep't of Labor & Indus.,* 14 Wn.2d 407, 128 P.2d 308 (1942); *Kaiser Alum. v. Dep't of Labor & Indus.,* 45 Wn.2d 745, 277 P.2d 742 (1954). "While the Board's interpretation of the Act is not binding [on] this court, it is entitled to great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).[10]

RCW 51.52.110 provides "[i]f such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board **shall become final**." RCW 51.52.110, *emphasis added.* "[I]t is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction." *Johnson v. Dep't of Labor & Indus.,* 33 Wn.2d 399, 402, 205 P.2d 896 (1949). Yet, it is clear the Court ignored the plain language of RCW 51.52.110's mandate of finality.

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[10] The Court's suggestion that the Board and its Industrial Appeals Judges have no expertise in the applicability of the common law is incorrect. *Decision* at 5, fn 4. The Board, as a matter of course, applies the published appellate decisions and its own Significant Decisions, the common law applying and interpreting the Industrial Insurance Act since its codification in 1911, when reviewing and deciding appeals from the Department's actions. RCW 51.52.140 provides that the practice in civil cases applies to appeals before the Board. In addition and by way of example only, until RCW 51.32.240(5) was amended in 2004 to allow for recovery of benefits obtained through willful misrepresentation with the proof requirements set forth therein, the Department and Board applied the elements of common law fraud when deciding cases of claim-related fraud. *In re: Norman L. Pixler*, BIIA Dec. 88 1201 (1989).

The "[r]ules of liberal construction cannot be used to change the meaning of a statute which in its ordinary sense is unambiguous. To allow such rules to be used for such a purpose would require the Court to usurp the legislative function and thereby violate the constitutional doctrine of separation of powers." *Wilson v. Dep't of Labor & Indus.*, 6 Wn. App. 902, 906, 496 P.2d 551 (1972).

Here, the Court of Appeals resorted to liberal construction to support its view that Weaver filed two separate workers' compensation claims for time loss and pension which precluded the prior final Board Decision denying his occupational disease claim from being final. *Decision*, 17-18.

The Court's Decision renders the finality provisions of RCW 51.52.050 and RCW 51.52.110 meaningless, striking the finality provisions of the statutes, usurping the legislative function and creating serious constitutional questions concerning separation of powers.

b. The Department and Board must utilize collateral estoppel and res judicata to effectuate the statutory mandates of finality.

Contrary to the Court's reasoning that common law doctrines of collateral estoppel and *res judicata* have a questionable place in the statutory scheme of Title 51, it is axiomatic that claim preclusion and issue preclusion apply to give effect to the statutory mandates of finality of Department and Board orders. *Decision,* 1-2, 6-7. The Court in *LeBire v. Dep't of Labor & Indus.,* 14 Wn.2d 407, 128 P.2d 308 (1942), held that an

order of the joint board of the Department, the entity charged with review of Department adjudications before the creation of the Board, from which no appeal is taken is "conclusive of the issues determined" and "binding on the appellant," and the order of the joint board "constituted a final judgment upon definite issues then before it." *LeBire*, 14 Wn.2d 407, 417-419. The Court, citing *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 147 P. 21 (1915), also held that absent fraud or mistake, "a final order or judgment, settled and entered by agreement or consent of the parties, is no less effective as a bar or estoppel than is one which is rendered upon contest and trial[.]" The Court in *LeBire* specifically rejected Weaver's contention that the prior adjudication of claim rejection does not apply to his new application now that he needs additional benefits:

> Appellant and his attorneys were fully aware of those reports and of the position taken by the department. The stipulation was not a waiver of any future right to compensation for an aggravation of an arthritic condition, but rather it was a recognition and admission by appellant that in reality such condition was not due to the injury.

Id. at 419. With Weaver's stipulated dismissal of his unperfected Superior Court appeal, the Board's Decision that his melanoma was not work related and did not constitute an occupational disease was not a waiver of future potential benefits, but a final and binding admission that he has no compensable workers' compensation claim regardless of the particular type of benefit being sought. RCW 51.52.110; *Kingery v. Dep't of Labor*

& Indus., 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (neither Board nor courts have the authority to overturn an unappealed final order of the Department absent issues of Department misconduct or claimant competence); *Marley v. Dep't of Labor & Indus.,* 125 Wn.2d 533, 886 P.2d 189 (1994) (unappealed Department order involving industrial insurance coverage is *res judicata* as to issues encompassed in order); *Lehtinen v. Weyerhaeuser*, 63 Wn.2d 456, 387 P.2d 760 (1964); *Ek v. Dep't of Labor & Indus.,* 181 Wash. 91, 41 P.2d 1097 (1935) (claim rejection for failure of proof condition work related "finally and judicially established there was no ground for recovery under the act" and precluded widow's claim for pension after claimant's passing); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 34 P.2d 457 (1934).

In addition to the statutorily mandated finality of the Board's Decision in the prior action, *res judicata* and collateral estoppel apply in the administrative setting to prohibit relitigation of a determinative fact or particular issue decided in a prior proceeding. *Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (Bremerton Civil Service Commission factual finding entitled to collateral estoppel effect in subsequent civil suit even where hearing examiners not attorneys and rules of evidence not in force); *Vargas v. State,* 116 Wn. App. 30, 37, 65 P.3d 330 (2003) (determinations in administrative settings have preclusive effect where agency acting in adjudicative capacity and parties have adequate opportunity to litigate). The Board recognizes the applicability of *res judicata* and collateral estoppel in Board proceedings as set forth *In re:*

Rick Yost, Sr., BIIA Dec. 0124199 (2003).

The City asserts that Weaver's second claim is barred by both *res judicata* and collateral estoppel and joins the Department's collateral estoppel arguments in its Petition for Review, focusing here on *res judicata*. Contrary to the Court's position at oral argument that Weaver's second action cannot be precluded by both collateral estoppel and *res judicata*, Weaver's second action is barred by both collateral estoppel and *res judicata* because there was one issue in Weaver's first action; whether his melanoma arose naturally and proximately out of the distinctive conditions of his employment such that he had a compensable workers' compensation occupational disease claim.[11]

Weaver's second action is precluded by the doctrine of *res judicata*, which is intended to "ensure the finality of judgments and eliminate duplicitous litigation[,]" and which applies in workers' compensation cases. *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274 (1999).

> Courts apply the doctrine of *res judicata* to prevent repetitive litigation of claims or causes of action arising out of the same facts and to "avoid repetitive litigation, conserve judicial resources, and prevent the moral force of court judgments from being undermined." *Res judicata* applies when (1) there has been a final judgment on the merits in a prior action between the same parties;

[11] The false distinction the Court attempted to draw is illustrated by reference to *Weyerhaeuser v. Farr*, 70 Wn. App. 759, 855 P.2d 711 (1993), *review denied*, 123 Wn.2d 1017 (1994) and *Kaiser Aluminum v. Overdorff*, 57 Wn. App. 291, 788 P.2d 8 (1990), where the Court analyzed the claimant's voluntary retirement status as a matter of law in the context of final and binding post-retirement orders finding them only permanently **partially** disabled. In those cases, entitlement to wage replacement benefits was one issue after the compensable claims had been reopened. The post-retirement PPD orders did not preclude reopening for treatment.

> and (2) the prior and present action involve (a) the same subject matter, (b) the same cause of action, (c) the same persons and parties, and (d) the same quality of persons for or against whom the claim is made.

Hyatt v. Dep't of Labor & Indus., 132 Wn. App. 387, 394, 132 P.3d 148 (2006), *citing Hisle v. Todd Pac. Shipyards Corp.*,113 Wash. App. 401, 410, 54 P.3d 687 (2002), *aff'd*, 151 Wn.2d 853, 93 P.3d 108 (2004) . Here, the Board's Decision in the prior action is a final judgment binding on the same parties. The prior and present action involve exactly the same subject matter; that is, the threshold question of whether Weaver's melanoma arose naturally and proximately out of the distinctive conditions of his employment such that it qualifies as a compensable occupational disease claim. Contrary to the Court's characterization of the City's and Department's position on identity of subject matter as "myopic," the facts in the record on appeal establish that both actions involve only the threshold determination of claim allowance. *Decision* at 22. In *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 478 P.2d 761 (1970), the Court held that the Board's jurisdiction is limited by the Department order on appeal and the notice of appeal which may limit, but not expand the issues. *See also DuFraine v. Dep't of Labor and Indus.*, 180 Wash. 504, 40 P.2d 987 (1935) (Superior Court reversing reject order cannot determine time loss or classification of disability). The Court's Decision here, in stark contrast, went beyond the issues in both claims and appeals to reach its conclusion.

Per *Lenk,* the Board and the Courts in either of Weaver's actions did not have authority to consider Weaver's entitlement to any particular form of benefit because the Department, having rejected the claim, has not passed on any other issue. The Court arrived at its Decision by reasoning that each type of potential workers' compensation benefit gives rise to a new claim, and that the original claim rejection when only one type of benefit is at issue at that stage of the claim has no effect when the worker's status changes and other types of benefits would be available. This is incorrect. The Board and Court, per *Lenk*, did not have authority to address anything beyond claim allowance. Weaver's contention that the prior claim was for time loss and the present claim is for pension, a contention the Court improvidently adopted, is wrong.[12]

The record establishes the subject matter is identical. The Court's Decision is premised on the false notion time loss and treatment were issues in the first claim and appeal whereas other benefits including pension benefits are issues in the second claim and appeal. *Decision* at 16-32.[13] The Court's statement that the Department and the City do not dispute that his two applications for benefits sought these distinct forms of benefits is patently false. *Decision* at 22. Weaver's first application was

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[12] In fact, contrary to the Court's factual recitation, if the claim were to be allowed, there is no guarantee he is entitled to wage replacement benefits, including pension benefits. *Decision at 2.*The Department has not passed on any entitlement to wage replacement benefits, and the City and Department would have to have him evaluated by an independent medical examiner to determine his physical capacities and determine whether he is and has been employable based on transferrable skills.

[13] The Court's resort to common law cases not involving the application and interpretation of the Industrial Insurance Act is not instructive or persuasive.

not an application for time loss and treatment. His first application was an application to have his claim allowed for melanoma as a work related condition. CP 277, Appendix B. The issues in the appeal, as limited by the Department order on appeal, were whether Weaver's condition of melanoma was an occupational disease and whether the firefighter presumption for occupational disease applied. CP 251-264; Appendix C.

Weaver's second application was not an application for pension benefits. His second application was to have his claim allowed for melanoma as a work-related condition. CP 280; Appendix D. The issues as set forth in the Board Order Establishing Litigation Schedule, as limited by the Department order on appeal, were whether the Department should have accepted Weaver's condition as an occupational disease and whether the firefighter presumption of RCW 51.32.185 applied to Weaver's condition. CP 73-77; Appendix E. When workers' compensation claims are filed, except in fatality cases, the nature, extent and duration of the benefits to which the claimant may be entitled is indeterminate unless the claimant is a statutory pension per RCW 51.08.160 at the time the claim is filed.[14] A workers' compensation claim for a condition determined to be work related may close with only medical benefits. If the already allowed claim is reopened based on objective worsening under RCW 51.32.160,

[14] RCW 51.08.160 provides that " 'Permanent total disability' means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." Where a worker otherwise covered by the Industrial Insurance falls under the specific physical situations listed, they are considered a statutory pension and entitled to pension benefits even if they are working or able to work. *In re: Jerry Belton*, BIIA Dec. 85 2107 (1987)

the claimant may be entitled to other forms of benefits including pension benefits and survivors' pension benefits. Even though the benefits are not at issue at the time the claim first closes, the potential eligibility for all types of benefits is established by statute and the case law interpreting Title 51 once a claim is allowed and is foreseeable.

In further reviewing whether the same cause of action is involved, the Court considers:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
(2) whether substantially the same evidence is presented in the two actions;
(3) whether the two suits involve infringement of the same right; and
(4) whether the two suits arise out of the same transactional nucleus of facts. The fourth criteria is the most important.

Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way, 96 Wn. App. 255, 262, 979 P.2d 464 (1991), *citing Hayes v. City of Seattle,* 131 Wn.2d 706, 713, 9334 P.2d 1179, 943 P.2d 265 (1997), and *Constantini*, 681 F.2d at 1201-02 (9th Cir. 1982).

First, if Weaver is permitted to relitigate his claim, the City's rights and interests established on behalf of the City's taxpayers in the prior judgment would be destroyed or impaired. The City would have to expend public resources to relitigate a claim which it already litigated and in which it prevailed where the parties had a full and fair opportunity to fully litigate claim allowance based on the evidence presented, per the Rules of Evidence and Rules of Superior Court. Second, although Weaver is not satisfied with the outcome of his first round of litigation, wishes not to be

bound by the final judgment, and has retained a different expert, the evidence is the same; that is, what were his work and non-work exposures and which exposures caused his melanoma on a medically more probable than not basis. Third, both actions involve infringement of the same right; here the threshold allowance or rejection of the claim for melanoma. Finally, both actions arise out of the same transactional nucleus of facts; again, what were his work and non-work exposures and which exposures caused his melanoma on a medically more probable than not basis. Weaver resorted to out-of-state cases in support of his appeal because, until the Court of Appeals adopted his baseless contentions, there were no Washington State cases interpreting the Industrial Insurance Act in his favor.

2. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S DECISIONS IN EK V. DEP'T OF LABOR & INDUS., MARLEY V. DEP'T OF LABOR & INDUS., AND KINGERY V. DEP'T OF LABOR & INDUS.

The Court improperly applied equity to relieve Weaver of the finality of the Board's Decision. However, this Court has held that equity is rarely exercised and in limited circumstances not present in Weaver's case. The Court in *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d. (1997), summarized the Court's decisions. In *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239 (1934), the Court applied equity and held an order not final where the claimant was violently insane, without a guardian, and the Department rejected his claim knowing of his

incapacity. In *Rodriquez v. Dep't of Labor & Indus.,* 85 Wn.2d 949, 540 P.2d 1359 (1975), the Court applied equity to allow an untimely appeal of a Department order where the claimant was illiterate and able to only speak Spanish.

In contrast, in *Marley v. Dep't of Labor & Indus.,* 125 Wn.2d 533, 886 P.2d 189 (1994), the Court refused to apply equity to relieve the claimant of finality of a Department order that she asserted incorrectly denied her a widow's pension, noting that a Department order, even one containing an error, was not void and was final.

The court in *Kingery,* rejecting a surviving spouse's second attempt to obtain a survivor's pension, noted as follows:

> Mrs. Kingery invites the Court to effectively overturn *Marley v. Department of Labor & Indus.,* 125 Wash.2d 533, 886 P.2d 189 (1994), recognizing a final unappealed Department order is *res judicata.* We decline to do so. Title 51 RCW does not afford Mrs. Kingery a remedy with respect to a final, unappealed Department order.
>
> She also seeks to extend the equitable power of Washington courts to set aside final unappealed Department orders beyond circumstances where the claimant was incompetent and the Department failed to properly communicate its order. We decline to extend equity to such an extent because it is difficult to envision a principled limit on the exercise of equitable power to avoid the requirements of the Industrial Insurance Act. Granting the relief Mrs. Kingery requests could fundamentally affect the processing of thousands of industrial insurance claims and open the door to requests by employers, the Department, and claimants to re-open otherwise final unappealed Department orders.

Kingery v. Dep't of Labor & Indus, 132 Wn.2d 162, 177–78, 937 P.2d 565, 573 (1997). *See also, Ek v. Dep't of Labor & Indus.,* 181 Wash. 91,

41 P.2d 1097 (1935). The facts of Weaver's case do not support application of equity. He is competent, and he was represented by counsel in the prior action.

3. THE COURT OF APPEALS' FAILURE TO APPLY THE STATUTORY MANDATE OF FINALITY AND APPLY COLLATERAL ESTOPPEL AND *RES JUDICATA* PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

This Court has, in very limited and defined circumstances, relieved parties in workers' compensation cases of the effects of the statutory mandate of finality, collateral estoppel and *res judicata*. However, in this case, the Court of Appeals held that Weaver's second claim is not barred by these principles because to do so would be unjust. The result, which should not be permitted to stand, is that employers and the Department (and claimants where they prefer to avoid the exclusive remedy provisions of Title 51) are free to litigate, in perpetuity, whether the conditions for which a claim is filed and allowed, are work-related conditions, or any other issue addressed in a final Department or Board order, when the potential financial exposure or type of benefit potential changes or increases. This is an untenable result for all stakeholders in the workers' compensation system which require that final decisions retain finality. Employers, including self-insured public entities funded by taxpayer dollars such as the City, and the Department will be left unable to predict the potential exposure in a claim or manage their risk. Claimants who previously felt secure in the knowledge that they had an allowed workers'

compensation claim allowing for all forms of workers' compensation benefits according to the facts and the law, including medical coverage, will be exposed to the potential of repeated rounds of litigation on causation and the need to fund and recall experts to maintain their determination of causation. The Court need only consider the opposite set of facts that Weaver's claim was allowed in the first action. When his melanoma worsened, under the Court's reasoning, the City would be permitted to relitigate whether his melanoma is work related when the financial exposure of the claim increased. This type of result is contrary to the Legislature's intent, is in conflict with decisions of this Court and the Court of Appeals, and constitutes an issue of substantial public interest that should be determined by this Court given the untold costs to workers, employers, including publicly funded cities, counties and fire districts and departments, and the Department.

VI. CONCLUSION

Based on the foregoing points and authorities, the City requests that this Court grant its petition and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 15th day of August, 2018.

PRATT, DAY & STRATTON, PLLC

By _____
Marné J. Horstman, # 27339
Attorneys for Petitioner,
City of Everett

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WEAVER, Appellant, v. CITY of EVERETT and STATE of WASHINGTON, DEPARTMENT of LABOR AND INDUSTRIES, Respondents.	DIVISION ONE No. 76324-5-I PUBLISHED OPINION FILED: July 16, 2018

DWYER, J. — Collateral estoppel and res judicata are common law doctrines that were, for centuries, applied solely to common law claims. The twentieth century rise of the administrative state brought with it an explosion of executive branch quasi-judicial decision-making. Eventually, the urge to apply common law principles in these otherwise statutorily-created forums proved irresistible. But the apples to oranges application of common law doctrines to statutory claims litigated in executive branch forums was—by its very nature—never guaranteed universal success. Many times, such applications fit nicely and a sound and fair resolution was achieved. Other times, however, the apples

to oranges application resulted in a distasteful fruit salad of injustice. This case falls into the latter category.

Michael Weaver, a long-time Everett firefighter, applied for compensation resulting from that which he alleged—and the law presumes—to be a work-related occupational disease. Weaver's petition is serious to him and his family; he suffers from brain cancer that has made it impossible for him to work and that will ultimately claim his life. The Board of Industrial Insurance Appeals ruled that either collateral estoppel or res judicata barred his claim. The superior court unfortunately adopted the same either/or analysis and also unfortunately ruled that Weaver's application was barred. But a careful review of these two distinct common law doctrines—conducted pursuant to the analytical framework mandated by our Supreme Court—reveals that neither doctrine, properly applied, bars Weaver's entreaty. Accordingly, we reverse.

I

Michael Weaver was employed between 1996 and 2014 by the City of Everett (the City) as a firefighter. In June 2011, Weaver noticed a mole on the skin of his left shoulder. The mole was removed and the resulting biopsy revealed that it contained a malignant melanoma.

Shortly thereafter, Weaver underwent surgery to remove the melanoma. After a period of recovery, Weaver returned to his employment as a firefighter.

The treatment and surgery caused Weaver to miss nearly five weeks of work, losing the opportunity to earn just under $10,000 in wages.[1]

While in recovery, in July 2011, Weaver filed a pro se application for temporary total disability benefits from the City, a self-insured entity for workers' compensation purposes. His application alleged that the malignant melanoma on his shoulder arose from his 15 years of working as a firefighter. He requested compensation for the nearly 5 weeks of wages that he had been unable to earn due to the medical treatment.

After initially granting Weaver's application, the Department of Labor and Industries (the Department) reconsidered its decision and denied his application. Thereafter, Weaver, through counsel, appealed the Department's denial order to the Board of Industrial Insurance Appeals (the Board). A hearing before an administrative law judge (ALJ) resulted. The City presented the published deposition testimony of two medical specialists, Dr. Robert Levenson, an oncologist, and Dr. John Hackett, a dermatologist.

Weaver's counsel, presumably due to monetary considerations, chose not to present the testimony of Dr. David Aboulafia, Weaver's treating oncologist. Nor did Weaver's attorney present testimony from a medical expert in oncology or dermatology.[2] Instead, Weaver's counsel presented the published deposition

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[1] Weaver's health insurance paid for the medical costs arising from his diagnosis and treatment in 2011.

[2] Based on our collective years of judging, we can easily imagine that significant costs would attach to retaining a medical specialist in oncology or dermatology to testify on Weaver's behalf during this proceeding, costs amounting to several thousands of dollars and possibly more than the value of the temporary total disability benefits that Weaver sought from the City. Indeed, although not a part of our record and therefore not a basis for our decision, at oral argument Weaver's current attorney informed the court that Weaver's present specialist in oncology had already been paid $19,000 for his medical-legal services in this case. Wash. Court of Appeals

testimony of Dr. Kenneth Coleman, a doctor with a practice in family and emergency medicine, but with no expertise in melanoma generally or in melanoma arising from occupational exposures specifically.

The ALJ recommended that the Board affirm the Department's order denying Weaver's application.[3] In February 2013, the Board adopted the ALJ's recommendation and issued a final order denying Weaver's application.

After the Board's ruling, Weaver's counsel withdrew. Weaver filed a pro se review petition in the superior court. Ten months later, with Weaver still unrepresented and no progress being made in the appeal, the parties entered into a stipulation and agreed order of dismissal. Weaver's petition for review was dismissed in late 2013.

In January 2014, Weaver began to have difficulty with mental processing and word finding. A magnetic resonance imaging test revealed a three-centimeter mass, a tumor, in the left frontal lobe of his brain.

Weaver immediately underwent surgery and the tumor was removed. The resulting biopsy diagnosed the tumor as a metastatic malignant melanoma, a form of cancer developing out of a primary cancer site. The logical conclusion was that the brain tumor had metastasized out of the malignant melanoma that Weaver noticed on his shoulder in 2011.

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oral argument, Weaver v. City of Everett, No. 76324-5-I (June 4, 2018), at 6 min., 08 sec. (on file with court).

[3] The ALJ acknowledged that the Industrial Insurance Act, Title 51 RCW, mandates that cancer arising during a worker's employment as a firefighter is presumed to be an occupational disease. See RCW 51.32.185. However, the ALJ concluded that the City had rebutted this presumption and that Weaver had not presented additional evidence to rebut the City's evidence. Notably, the ALJ found that the opinion testimony of the City's medical specialists outweighed that of Dr. Coleman, Weaver's sole expert witness.

Weaver did not return to work as a firefighter after the surgery. He was estimated to have a 20 to 30 percent chance of survival over the next two years.

In July 2014, Weaver, now represented by counsel, submitted an application for workers' compensation from the City, seeking permanent total disability benefits. The application alleged that he suffered from a malignant melanoma located on his "upper back/scapula area, w/ cancer spreading to brain." He alleged that the condition arose from "sun exposure during outdoor firefighting and training from 1996 forward."

The Department denied Weaver's application on the basis that it had already rejected his application for compensation based on the malignant melanoma discovered on his shoulder and that the metastasized melanoma had arisen from the earlier melanoma.

Weaver sought an administrative appeal and, in the resulting proceeding, the ALJ recommended that the Board affirm the Department's rejection of Weaver's application for permanent total disability benefits. The executive branch official concluded that the common law doctrines of res judicata and collateral estoppel barred Weaver's application. The board, an executive branch agency, adopted the ALJ's proposed decision and order as its final order.[4]

[4] The Board is an executive branch agency. RCW 51.52.010. Accordingly, insofar as we review the Board's determination concerning the application of common law doctrines, we grant no deference to an assessment by an executive branch agency of the applicability of court-created doctrines of preclusion. Dana's Housekeeping, Inc. v. Dep't of Labor & Indus., 76 Wn. App. 600, 605-06, 886 P.2d 1147 (1995) ("An agency's legal interpretation in areas outside of its expertise is entitled to no deference." (citing Russell v. Dep't of Human Rights, 70 Wn. App. 408, 412, 854 P.2d 1087 (1993))). Executive branch officials do not have specific expertise in the development and applicability of the common law. Judges do.

Weaver filed a notice of appeal to the superior court. The superior court affirmed the Board's order and denied Weaver's petition, ruling that either collateral estoppel or res judicata barred his claim.

Weaver now appeals.

II

A

It is necessary for us to determine whether the superior court erred by affirming the Board's application of the doctrines of collateral estoppel and res judicata to bar Weaver from pursuing his claim for compensation under the Industrial Insurance Act, Title 51 RCW.

At the outset, we note that collateral estoppel and res judicata are equitable, court-created doctrines established at common law. See J.M. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 P. 775 (1905); see also Phillip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805, 806, 842 (1985). We further note that the Industrial Insurance Act, as set forth below, was enacted by our legislature in 1911 with the intent to abolish the common law cause of action then-available to workers and establish in its place a distinct statutory scheme aimed at providing workers "sure and certain relief." LAWS OF 1911, ch. 74, § 1, at 345.

Accordingly, in resolving the matter before us, we proceed with due caution so as to not unduly shoehorn common law concepts into a statutory scheme wherein our legislature did not specifically call for them to apply or may not otherwise have intended for their application.

B

Collateral estoppel and res judicata are affirmative defenses. Lemond v. Dep't of Licensing, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (collateral estoppel) (quoting State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300 (2002)); Davignon v. Clemmey, 322 F.3d 1, 17 (1st Cir. 2003) (res judicata). The proponent of either doctrine has the burden of proof. Lemond, 143 Wn. App. at 805 (quoting State Farm Mut. Auto. Ins. Co., 114 Wn. App. at 304); Davignon, 322 F.3d at 17.

Whether collateral estoppel or res judicata apply to preclude litigation is a question of law that we review de novo. Lemond, 143 Wn. App. at 803 (collateral estoppel) (citing State v. Vasquez, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002)); Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata) (citing Kuhlman v. Thomas, 78 Wn. App. 115, 119-20, 897 P.2d 365 (1995)). In reviewing a superior court ruling in a workers' compensation matter, we apply a standard of review akin to our review of any other superior court trial judgment. Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

On appeal, both the Department and the City urge us to affirm the decision of the superior court on the basis that they established that collateral estoppel and res judicata apply to preclude litigation on Weaver's application.[5] We address each doctrine in turn.

[5] At oral argument, the Department and the City each pressed a different basis for affirmance. While the Department contended that it established that collateral estoppel bars Weaver's application for permanent total disability benefits, the City contended that it established that Weaver's application is precluded by res judicata.

III

As an initial matter, the Department and the City contend that they established that collateral estoppel bars Weaver's application for permanent total disability benefits. We disagree.

A

The principles underlying the common law doctrine of collateral estoppel are well set forth in our opinion in Lemond.

> Collateral estoppel "'prevents relitigation of an issue after the party estopped has had a *full and fair opportunity* to present its case.'" Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994) (quoting Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)). Collateral estoppel, or issue preclusion, is the applicable preclusive principle when "the subsequent suit involves a different claim but the same issue." Phillip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L. REV. 805 (1985). Thus,
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> > [w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.
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> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Collateral estoppel prevents relitigation of issues in a subsequent claim or cause of action, whereas res judicata prevents a second assertion of the same claim or cause of action. Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978). Thus, res judicata is generally referred to as claim preclusion, and collateral estoppel as issue preclusion. Trautman, supra, at 829.
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> The purpose of the doctrine of collateral estoppel is to promote judicial economy by avoiding relitigation of the same issue, to afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to litigants. Hanson, 121 Wn.2d at 561. These purposes are balanced against the important competing interest of not depriving a litigant

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That the Department and the City, each defending the superior court's ruling here at issue, do not agree as to the proper basis on which to affirm the superior court's decision informs our inquiry in this matter.

> of the opportunity to adequately argue the case in court. RESTATEMENT, supra, § 27 cmt. c. at 252.
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> The proponent of the application of the doctrine has the burden of proving four elements to demonstrate the necessity of its applicability:
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> > "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) *application of the doctrine does not work an injustice."*
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> Thompson v. Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (quoting Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)). Because all four elements must be proved, the proponent's failure to establish any one element is fatal to the proponent's claim.

143 Wn. App. at 803-05 (emphasis added).

Here, the Department has established the first three elements of collateral estoppel. Both of Weaver's applications for compensation regarded the identical issue of whether the malignant melanoma diagnosed on his left shoulder was caused by his employment as a firefighter. In addition, Weaver's application for temporary total disability benefits ended in a final judgment on the merits (the dismissal of his appeal). Additionally, the Department and the City were both parties to Weaver's application for temporary total disability benefits.

B

The remaining question is whether the Department and the City proved the fourth element of collateral estoppel—that application of the doctrine would not work an injustice against Weaver.

They did not.

"Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." Hadley v. Maxwell, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). Application of the doctrine works an injustice upon a party when, during an earlier proceeding, that party did not have a "'full and fair opportunity'" to litigate the contested issue. Lemond, 143 Wn. App. at 803-04 (internal quotation marks omitted) (quoting Barr, 124 Wn.2d at 324-25). Indeed, for collateral estoppel to apply, the party must have had "sufficient motivation for a full and vigorous litigation of the issue." Hadley, 144 Wn.2d at 315.

Our Supreme Court's decision in Hadley is both controlling and instructive. In Hadley, two automobiles collided with one another. One of the drivers, Helen Maxwell, was issued a $95 citation for an improper lane-travel traffic infraction. Thereafter, Maxwell, pro se, unsuccessfully contested the citation before the district court. She did not call any witnesses on her behalf nor did she elect to appeal the district court's adverse decision to the superior court. Hadley, 144 Wn.2d at 308-09. In a subsequent personal injury lawsuit arising from the collision, the trial court ruled that Maxwell was collaterally estopped from denying her violation of the lane change statute. This was so, the trial court ruled, because Maxwell failed to appeal the district court's decision that she had committed the infraction. Hadley, 144 Wn.2d at 309-10. In the resulting trial, Maxwell was found liable for $136,000 in damages. Hadley, 144 Wn.2d at 310.

Appealing to our Supreme Court, Maxwell challenged the collateral estoppel ruling on the basis that its application constituted an injustice. As the court explained:

> To determine whether an injustice will be done, respected authorities urge us to consider whether "the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort." 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 373, at 763 (5th ed.1996); see also Parklane [Hosiery Co. v. Shore], 439 U.S. [322,] 330[, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)] (holding incentive to vigorously contest cases with small or nominal damages at stake could be a reason not to apply collateral estoppel); Beale v. Speck, 127 Idaho 521, 903 P.2d 110, 119 (1995) (holding collateral estoppel for misdemeanor traffic offenses generally inappropriate); Rice v. Massalone, 554 N.Y.S.2d 294, 160 A.D.2d 861 (1990) (holding collateral estoppel inappropriate after an administrative determination of liability for a traffic accident).

Hadley, 144 Wn.2d at 312. The Supreme Court adopted this consideration and instructed that collateral estoppel "is not generally appropriate when there is nothing more at stake than a nominal fine." Hadley, 144 Wn.2d at 315. Turning to Maxwell's circumstance, the court determined that "the incentive to litigate was low—Maxwell was at risk $95." Hadley, 144 Wn.2d at 312. The court accordingly ruled that, in the district court proceeding, Maxwell lacked sufficient motivation to fully and vigorously litigate whether she, in fact, committed the traffic infraction. Thus, the Supreme Court held, the superior court erred by precluding her from contesting that issue at the subsequent civil trial.

Weaver's circumstances are strikingly similar to those in Hadley. As with Maxwell's nominal incentive to litigate a $95 citation before the district court, Weaver's incentive to fully and vigorously litigate during the proceeding on his application for temporary compensation was low. Indeed, Weaver's initial application for compensation sought only temporary total disability benefits, those wages equivalent to five weeks of missed work. Weaver anticipated that he would—and he did—return to his duties as a firefighter after completing his

recovery. He was not then, as he is now, confronted by a brain cancer that is alleged to have left him permanently disabled, unable to work, with significant out-of-pocket medical expenses, and with a real possibility of death arising from the cancer.

Moreover, that Weaver had less than $10,000 in benefits at stake during his application for temporary compensation further informs our inquiry. Indeed, had Weaver retained a specialist in oncology or dermatology (or both), the cost of doing so might rival—or perhaps even eclipse—the modest benefit amount that he sought and, if his efforts proved unsuccessful, he would be entirely unable to recover these costs. See RCW 51.32.185(7).[6]

We note that our legislature has, for over 30 years, recognized that civil actions in which the amount in controversy is less than $10,000 fall into a special category of "small claims." See RCW 4.84.250. The legislature thus provided that

> in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

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[6] RCW 51.32.185(7) reads, in pertinent part,

> (7)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals *and the final decision allows the claim for benefits*, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.
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> (b) When a determination involving the presumption established in this section is appealed to any court *and the final decision allows the claim for benefits*, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(Emphasis added.)

> *After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.*

RCW 4.84.250 (emphasis added). This cost- and fee-shifting provision manifested a recognition by the legislature of the economic difficulties that arise in fully litigating—whether as plaintiff or defendant—small monetary claims.

In this light, that Weaver's application for temporary compensation sought less than $10,000 in benefits supports that he sought an amount that did not provide sufficient motivation for a full and vigorous litigation of the initial compensation claim.

Viewed in the totality, the prevailing circumstances underlying Weaver's application for temporary total disability benefits suggest that he did not have sufficient motivation to fully and vigorously litigate the issue of whether his employment caused his cancer during the proceeding on his temporary compensation application. Accordingly, application of collateral estoppel to preclude him from litigating that issue in his present application works an injustice.

The Department and the City did not establish that application of collateral estoppel would not work an injustice against Weaver.[7] Accordingly, the superior court erred by barring Weaver's application on the basis of collateral estoppel.

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[7] The Department contends that it established the fourth element of collateral estoppel because no procedural unfairness resulted to Weaver during the proceeding on his application for temporary compensation. The Department's argument fails. Procedural unfairness is not the only consideration material to whether application of collateral estoppel would work an injustice against a party. See, e.g., Hadley, 144 Wn.2d 306.

The Department next relies on State v. Hite, 3 Wn. App. 9, 472 P.2d 600 (1970), for the proposition that the inquiry into the fourth element of collateral estoppel includes a foreseeability component. Because Hite sets forth no such proposition, the Department's reliance is unavailing.

IV

The Department and the City next contend that they established that res judicata precludes Weaver's application for permanent total disability benefits. We disagree.

A

Res judicata is an equitable court-created doctrine established at common law. See Weidlich v. Indep. Asphalt Paving Co., 94 Wash. 395, 406, 162 P. 541 (1917); see also J.M. Weatherwax Lumber Co., 38 Wash. at 548; United States v. 111.2 Acres of Land, 293 F. Supp. 1042, 1049 (E.D. Wash 1968), aff'd, 435 F.2d 561 (9th Cir. 1970); accord Trautman, 60 WASH. L. REV. at 806, 828-29. Generally, res judicata bars the relitigation of claims that were litigated, *might* have been litigated, or *should* have been litigated in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

In Washington, res judicata applies "where a prior final judgment is identical to the challenged action in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" Lynn, 130 Wn. App. at 836 (quoting Loveridge, 125 Wn.2d at 763).

Here, there is no dispute that the Department and the City established the third element of res judicata—concurrence of identity between persons and parties—and the fourth element—concurrence of identity between quality of the persons for or against whom the claim is made.

The City and Department contend that they established the second element of res judicata—concurrence of identity of cause of action between Weaver's applications for compensation. This is so, the City and Department assert, because the Industrial Insurance Act grants workers a single cause of action for an allowance.

We accept, without analysis and for the limited purpose of resolving the matter before us, the contention that the Act sets forth a single cause of action for an allowance.

B

The Department and the City next contend that they established the first element of res judicata—concurrence of identity in subject matter between Weaver's applications for compensation under the Act. They did not.

1

In determining whether a party has established concurrence of identity of subject matter between two claims, the critical factors are "the nature of the claim or cause of action and the nature of the parties." Trautman, 60 WASH. L. REV. at 812-13 (citing Mellor v. Chamberlin, 100 Wn.2d 643, 673.P.2d 610 (1983)). As set forth in Black's Law Dictionary, "subject matter" is "[t]he issue presented for consideration; *the thing* in which a right or duty has been asserted; *the thing* in dispute." BLACK'S LAW DICTIONARY 1652 (10th ed. 2014) (emphasis added).

Our Supreme Court's decision in Mellor is instructive. There, the court addressed whether a lawsuit predicated on the same real estate transaction as an earlier lawsuit constituted litigation of the same subject matter for the purpose

of res judicata. Answering in the negative, the court ruled that, "[a]lthough both lawsuits arose out of the same transaction (sale of property), their subject matter differed. The first lawsuit disputed whether the Chamberlins misrepresented the parking lot as part of the sale. The second questioned whether Buckman's claim of encroachment breached the covenant of title."[8] Mellor, 100 Wn.2d at 646.

In support of its ruling, the Mellor court relied on its decision in Harsin v. Oman, 68 Wash. 281, 123 P. 1 (1912), wherein

> the plaintiff initially sued for a breach of a covenant against encumbrances and recovered nominal damages. A more substantial breach occurred and plaintiff sued on the same covenant. Harsin v. Oman, supra at 283. Defendants argued the second action was barred by res judicata. Holding for the plaintiff, we declared:
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> > While it is admitted, there can be but one recovery upon the same cause of action. This does not mean the subject-matter of a cause of action can be litigated but once. *It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist.* It follows from the very nature of things that a cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment.
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> 68 Wash. at 283-84.
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> The law in Harsin is applicable in this present case. When the first suit for misrepresentation was filed, Mellor had neither suffered damages from the encroachment nor was he under an obligation to insist Buckman enforce her rights. Mellor v. Chamberlin, supra [34 Wn. App. 378,] 382-83 [, 661 P.2d 996 (1983)]. It was over a year after the settlement of the misrepresentation claim that Buckman decided to enforce her encroachment claim. Until that time, Mellor's lawsuit was not ripe.

[8] The misrepresentation action sought damages arising from the misleading conduct regarding the parking lot and the breach of a covenant of title action presumably sought recovery of $5,000 (the amount that the Chamberlins paid to Buckman to purchase the encroaching property), plus costs and fees. Mellor, 100 Wn.2d at 644-45.

Mellor, 100 Wn.2d at 646-47 (emphasis added). Thus, the Mellor court ruled that the second claim therein was not identical in subject matter to the prior claim because, at the time that the prior claim was filed, the subject matter underlying the second claim did not exist—and, hence, could not have been litigated.

Accordingly, pursuant to the reasoning in Mellor and Harsin, the question before us is whether the Department and the City established that the subject matter of Weaver's applications for compensation were identical—that is, whether the subject matter of his application for permanent total disability benefits could—or should—have been litigated during the proceeding on his application for temporary total disability benefits.

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The Department and the City have not established that the subject matter of Weaver's applications pursuant to the Act is identical. Indeed, the Department and the City have not shown that Weaver's applications sought identical relief. They have not shown that his applications alleged identical facts. And, critically, they have not shown that the foregoing relief and facts set forth in his application for permanent total disability benefits could have or should have been litigated during the proceeding on his application for temporary total disability benefits.

i

The Department has not established that the relief sought by Weaver in his applications for compensation under the Act was identical.

As indicated, Weaver submitted two different applications for benefits—an application for temporary total disability benefits and an application for permanent

total disability benefits. In his application for temporary benefits, Weaver sought a one-time award of compensation arising from his total inability to work for a period of five weeks due to the treatment of the malignant melanoma on his shoulder. His application for permanent benefits, in contrast, requested recurring pension payments arising from his total inability to obtain gainful employment because of his metastasized malignant melanoma. That each of Weaver's applications requested different compensation suggests that he was not seeking identical relief in each application.

As will be addressed below, both the circumstances under which the Act was enacted and the Act's provisions reinforce this view. In addition, in reviewing the Act, we are mindful that

> [t]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be *liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.*

Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (emphasis added) (citing RCW 51.12.010; Sacred Heart Med. Ctr. v. Carrado, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); Lightle v. Dep't of Labor & Indus., 68 Wn.2d 507, 510, 413 P.2d 814 (1966); Wilber v. Dep't of Labor & Indus., 61 Wn.2d 439, 446, 378 P.2d 684 (1963); State ex rel. Crabb v. Olinger, 196 Wash. 308, 311, 82 P.2d 865 (1938); Gaines v. Dep't of Labor & Indus., 1 Wn. App. 547, 552, 463 P.2d 269 (1969)).

The provisions and structure of the Act suggest that the legislature deliberately separated out the subject matter of a worker's personal injury action.

Prior to the Act's passage, workers seeking damages for injuries suffered in the course of their employment resorted to a common law personal injury action against their employers. See, e.g., McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 P. 237 (1909); Ongaro v. Twohy, 49 Wash. 93, 94 P. 916 (1908). In this personal injury action, a worker had to not only allege and prove all factual bases and damages arising from the workplace injury but also prove the possibility of future damages (aggravation or death) arising from the injury, or else be precluded from doing so in a subsequent action. Sprague v. Adams, 139 Wash. 510, 520, 247 P. 960 (1926) ("[T]he decided weight of authority in this country supports the view that damages resulting from a single tort . . . are, when suffered by one person, the subject of only one suit as against the wrongdoer."); McGuire, 53 Wash. at 429. Accordingly, at common law, the cause of action then-available to workers and the subject matter underlying that cause of action were one and the same.[9]

In 1911, however, the legislature abolished the worker's personal injury action, declaring:

> *The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions.* In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends

[9] Indeed, in such a tort action, splitting a claim was forbidden. Sprague, 139 Wash. 510; White v. Miley, 137 Wash. 80, 241 P. 670 (1925); Kinsey v. Duteau, 126 Wash. 330, 218 P. 230 (1923); Collins v. Gleason, 47 Wash. 62, 91 P. 566 (1907); Kline v. Stein, 46 Wash. 546, 90 P. 1041 (1907); see also Enslev v. Pitcher, 152 Wn. App. 891, 222 P.3d 99 (2009); Landry v. Luscher, 95 Wn. App. 779, 976 P.2d 1274 (1999).

> upon its industries, and even more upon the welfare of its wage-worker. *The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy*, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end *all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.*

LAWS OF 1911, ch. 74, § 1, at 345 (emphasis added).[10]

As explained by our Supreme Court:

> The Act is based on a quid pro quo compromise between employees and employers. The court in Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 590-91, 158 P. 256 (1916) explained the compromise: *The employer agreed to pay on some claims for which there had been no common law liability in exchange for limited liability. The employee agreed to give up available common law actions and remedies in exchange for sure and certain relief under the Act.* See Weiffenbach v. Seattle, 193 Wash. 528, 534-35, 76 P.2d 589 (1938).

McCarthy v. Dep't of Soc. & Health Servs., 110 Wn.2d 812, 816, 759 P.2d 351 (1988) (emphasis added). Accordingly, the Act provided a legal framework for relief distinct from that previously available to workers at common law.[11]

As applied to the statutory relief made available to workers, the Act's provisions suggest that the legislature split the relief obtainable by workers in a

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[10] This provision, as codified, remains identical, with the exception of its first sentence, which now reads: "The common law system governing the remedy of workers against employers *for injuries received in employment* is inconsistent with modern industrial conditions." RCW 51.04.010 (emphasis added).

[11] See also Carrera v. Olmstead, 196 Wn. App. 240, 246, 383 P.3d 563 (2016), aff'd, 189 Wn.2d 297, 401 P.3d 304 (2017) (the Act "grant[ed] workers injured on the job 'speedy and sure relief' in the form of workers' compensation benefits, but prohibit[ed] them from bringing negligence actions against their employers").

manner that did not previously exist at common law. Initially, and most obviously, the Act both categorized the relief available to workers into compensation schedules—predicated on the scope of the worker's injury—and fixed to a specified amount the relief available to workers. See LAWS OF 1911, ch. 74, § 5(a), at 356-58 (compensation schedule for an injury causing death); LAWS OF 1911, ch. 74, § 5(b), at 358 (compensation schedule for an injury causing permanent total disability); LAWS OF 1911, ch. 74, § 5(d), at 359 (compensation schedule for an injury causing temporary total disability); LAWS OF 1911, ch. 74, § 5(f), at 360 (compensation schedule for an injury causing permanent partial disability).[12] Compensation schedules that separated out and established the relief to which a worker was entitled based on the scope of the disability did not, of course, exist at common law.

Additionally, the Act separated out the relief that the worker could obtain for an aggravation of an initial injury.

> *If aggravation*, diminution, or termination *of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated* in any case the department may, *upon the application of the beneficiary* or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

LAWS OF 1911, ch. 74, § 5(h) at 360-61 (emphasis added).[13] The Act thus provided a worker with the ability to obtain relief for an initial injury and—in a

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[12] See also RCW 51.32.050 (compensation schedule where injury causes death); RCW 51.32.060 (compensation schedule where injury causes permanent total disability); RCW 51.32.080(compensation schedule where injury causes permanent partial disability); RCW 51.32.090 (compensation schedule where injury causes temporary total disability).

[13] See also RCW 51.32.160.

subsequent action—obtain additional relief that had not been alleged during the initial action. Consequently, this provision also separated the relief available to a worker in a manner not existing at common law. Accordingly, these provisions support that the legislature explicitly separated out the relief available to workers into distinct subject matter, rather than the unified subject matter of the common law claim.

In this light, Weaver's applications under the Act did not seek identical relief. In fact, neither the Department nor the City dispute that his requests for temporary total disability benefits and permanent total disability benefits sought distinct compensation.

Nevertheless, the Department and the City contend that Weaver's applications sought identical relief. This is so, they assert, because the only subject of relief set forth in the Act was compensation for workplace injuries. Therefore, the Department and the City continue, Weaver's applications merely sought compensation under the Act and thus had identical subject matter.

This myopic contention is unconvincing. As analyzed, the foregoing provisions of the Act suggest that the legislature did not, in actuality, set forth a singular form of relief for compensation for workplace injuries. Indeed, a single award of compensation was the relief previously available at common law and, as indicated, the legislature specifically declared that it was abolishing the common law action and replacing it with a distinct statutory scheme. LAWS OF 1911, ch. 74, § 1, at 345.

Thus, the Department and the City have not established that Weaver's applications sought identical relief under the Act.

ii

The Department and the City have also not established that Weaver's applications involved identical facts.

As indicated, Weaver filed an application for temporary total disability benefits and another application for permanent total disability benefits. In support of his application for temporary compensation that he filed in 2011, he alleged that he suffered from a malignant melanoma on the skin of his shoulder, the treatment of which caused him to miss five weeks of work before he was able to return. He further alleged that his employment as a firefighter caused the cancer.

In support of his application for permanent compensation that he filed in 2014, he alleged that he suffered from a newly diagnosed metastatic malignant melanoma that manifested itself as a brain tumor and that he was permanently unable to obtain gainful employment.[14]

Generally speaking, although there are some commonalities between Weaver's applications, it is evident that the facts underlying his applications are not identical. The Act—and judicial construction thereof—reinforce this view.

As will be iterated below, the Act's provisions suggest that the legislature split the evidence and proofs that a worker's application could establish in a

[14] Weaver's 2014 application also alleged that he suffered from a malignant melanoma on his shoulder and that his employment as a firefighter caused the cancer.

manner that did not previously exist at common law. To begin, the Act required the following in order to request compensation:

> SEC. 5. *Schedule of Awards*
> **Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer**, or his family or dependents in case of death of the workman, **shall receive out of the accident fund compensation in accordance with the following schedule**, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsover.
>
> . . . .
>
> SEC. 12. *Filing Claim for Compensation*
> (a) **Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him,** and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

LAWS OF 1911, ch. 74, §§ 5, 12, at 356, 364-65 (bolded emphasis added).[15] These provisions therefore require a worker to submit a certification of his attending physician in order to support his application for compensation, a factual predicate that was not specifically mandated at common law.

Moreover, establishing an attending physician's certification as a predicate for a worker's application suggests the worker was limited to only alleging the factual basis for an actual—rather than a potential—injury. Unlike at common law, these provisions do not suggest that the worker could allege facts in support

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[15] See also RCW 51.28.020(1)(a). The Act defined that "[t]he words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease." LAWS OF 1911, ch. 74, § 3, at 349. The Act was later amended to add "occupational diseases"—including of the type alleged by Weaver in this matter—as compensable when "such disease or infection" "arises naturally and proximately out of extra-hazardous employment." LAWS OF 1941, ch. 235, § 1, at 772. See also RCW 51.32.160.

of the possibility of additional injury or death arising from the initial injury. Furthermore, by setting forth that a qualifying worker would receive "compensation in accordance with the following schedule," these provisions linked a workers' compensation to the specific injury alleged by the worker.

Hence, by requiring specific proof of injury and linking the specified compensation to such proof, a distinction not made at common law, these provisions support that the Act separated out the factual basis for requesting relief under the Act.

Additionally, the foregoing provision authorizing compensation for a later-discovered aggravation of a worker's initial injury supports this view. See LAWS OF 1911, ch. 74, § 5(h) at 360-61.[16] Indeed, a worker submitting an application for an aggravation of an initial injury could not rely on the factual basis that supported the worker's initial application for compensation. Rather, the worker was required "to present medical testimony of a causal connection based on 'some *objective medical evidence' that the injury 'has worsened since the initial closure of the claim.*'" Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 353, 409 P.3d 1162 (2018) (emphasis added) (quoting Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 432, 858 P.2d 503 (1993)) (quoting Washington appellate decisional authority).[17] Hence, this provision allowed a worker to

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[16] If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

[17] These evidentiary requirements are no mere formality. "[I]n dealing with the Washington Industrial Insurance Act, 'persons who claim rights thereunder should be held to strict proof of their right to receive benefits provided by the [A]ct.'" Wilson v. Dep't of Labor & Indus., 6

introduce new facts related to the initial injury in a subsequent compensation proceeding that were not alleged during the initial compensation proceeding. As indicated, at common law, a worker could not, of course, split his claim for damages arising from a single injury.

The provisions setting forth the factual basis for obtaining compensation for an injury that disabled the worker and for an injury that resulted in the worker's death also support that the legislature split the factual basis of a worker's action. As indicated, § 12 of the Act regarded the filing of a claim for compensation and subsection (a) thereof set forth that, "Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him." LAWS OF 1911, ch. 74, § 12(a), at 364. Notably, in subsection (b) of that provision, the legislature set forth that,

> [w]here death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, *which application must be accompanied with proof of death and proof of relationship* showing the parties to be entitled to compensation under this act, *certificates of attending physician, if any,* and such other proof as required by the rules of the department.

Laws of 1911, ch. 74, § 12(b), at 364-65 (emphasis added).[18] Given that, an application for an injury resulting in death required proof of death and proof of relationship, a factual basis not identical to an application for an injury that results

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Wn. App. 902, 907, 496 P.2d 551 (1972) (quoting Hastings v. Dep't of Labor & Indus., 24 Wn.2d 1, 12, 163 P.2d 142 (1945)).

[18] See also RCW 51.28.030.

in a disabling condition. Again, such claim splitting was not permitted at common law.

Lastly, that the Act requires distinct factual bases in order to establish a worker's entitlement to a specific compensation schedule supports that the Act separated out the facts of a worker's claim. As pertinent here, the provision regarding a "temporary total disability" requires a worker to establish that the worker suffers from "a condition *temporarily* incapacitating the workman from performing any work at any gainful occupation." Bonko v. Dep't of Labor & Indus., 2 Wn. App. 22, 25, 466 P.2d 526 (1970) (emphasis added) (citing RCW 51.32.090; Nash v. Dep't of Labor & Indus., 1 Wn. App. 705, 709, 462 P.2d 988 (1969)). In contrast, a "[p]ermanent total disability is defined as a 'condition *permanently* incapacitating the workman from performing any work at any gainful occupation.'" Bonko, 2 Wn. App. at 25 (quoting RCW 51.08.160).

In this light, the foregoing provisions suggest that the Act split the factual bases of the common law cause of action when creating the workers' compensation system.

As applied to the matter herein, Weaver's applications did not allege identical facts. His application for temporary total disability benefits alleged that he had missed five weeks of work arising from the treatment of the malignant melanoma on his shoulder. In contrast, his application for permanent total disability benefits alleged that he was permanently unable to continue on in his employment after the malignant melanoma on his shoulder metastasized and manifested itself as a brain tumor. Indeed, the medical evidence that he would

need to present in order to support each application would clearly not be the same. Thus, the factual basis for Weaver's applications are not identical.

Accordingly, the Department and the City did not establish that his applications involved identical facts.

iii

Lastly, and significantly, the Department and the City did not establish that Weaver could—or should—have litigated the subject matter of his application for permanent total disability benefits at the time that he litigated his application for temporary total disability benefits.

The factual basis for Weaver's application for permanent total disability benefits—the brain tumor—was not discovered until 2014, three years after his application for temporary total disability benefits was submitted. Indeed, it is undisputed that the basis underlying Weaver's allegations of permanent disability did not accrue until 2014—when the brain tumor impaired his capacity to perform the duties of a firefighter. Therefore, the facts underlying Weaver's application for permanent total disability benefits and the relief that he sought thereunder could not have been litigated at the time of his 2011 application.

Nevertheless, the Department contends that Weaver should have litigated the subject matter set forth in the application here at issue during the 2011 proceeding on his application for temporary total disability benefits. This is so, the Department asserts, because facts regarding the potential that his cancer might metastasize were set forth in the record during the 2011 proceeding.

The Department is mistaken. The referenced evidence was subject to exclusion but came in without objection—for reasons tactical or otherwise. Nevertheless, there is no indication that this evidence was material to Weaver's application during the earlier proceeding. Indeed, the possibility that Weaver's cancer might metastasize was irrelevant to whether Weaver was entitled to lump sum compensation recoverable under the Act for his temporary inability to earn wages as a firefighter while recovering from the surgery. Weaver did not fail to litigate something that he should have litigated in the first proceeding. The Department's contention fails.[19]

C

At the time that Weaver submitted his application for temporary total disability benefits, the facts underlying his application for permanent total disability benefits had not yet occurred and the permanent relief that he sought thereunder could not plausibly have been requested. Thus, the Department and the City have not established the first element of res judicata, that the subject matter of Weaver's applications were identical.

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[19] The Department and the City also have not established that the equities underlying res judicata are in their favor. As indicated, in construing the Act, we resolve doubts in favor of the worker. See Dennis, 109 Wn.2d at 470. Initially, we are generally reluctant to apply this common law doctrine given that the legislature elected to preempt the worker's common law personal injury action and institute its own statutory scheme while *not* electing to incorporate the law of preclusion into the Act's provisions. Caution in precluding Weaver's application in this matter is further warranted because it would weigh against the legislative judgment that cancer manifesting itself during a worker's employment as a firefighter is presumed to have been caused by the firefighter's employment. See RCW 51.32.185(1). Thus, the Department and the City have not established that applying res judicata to preclude Weaver's application would be equitable.

Accordingly, the superior court erred by determining that res judicata barred Weaver's application for permanent total disability benefits.[20, 21]

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[20] As indicated, we accepted, without analyzing, the Department's contention that the Act sets forth a single cause of action for an allowance. We note, however, that if the Department or the City contend in the alternative that the Act sets forth *multiple* causes of action, res judicata would not apply. Indeed, if the Act sets forth multiple causes of action and, as analyzed, the Act abolished the common law action available to workers, this reinforces the view set forth herein that the legislature split the common law cause of action into multiple components. Assuming the common law action was so split, Weaver's applications for compensation constituted separate causes of action and res judicata would not apply.

[21] After oral argument in this court, the City submitted a statement of additional authorities, citing four cases to us. One is an opinion from our court, decided six years ago. Three are Supreme Court cases decided more than 80 years ago. Needless to say, all were available to counsel when her briefing was filed.

We have previously expressed our disaffection with this approach to appellate advocacy. See O'Neill v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014). By citing this authority to us, for the first time, after oral argument, counsel has deprived her opposing counsel of the opportunity to express his views on the authority. And, needless to say, counsel deprived us of the opportunity to explore the applicability, if any, of these cases during oral argument.

Nevertheless, as dutiful messengers of our judicial reasoning, we elect to address the cases cited, as follows:

1. Magee v. Rite Aid, 167 Wn. App. 60, 277 P.3d 1 (2012). This is an opinion explaining subject matter jurisdiction in general and the board's subject matter jurisdiction in particular. It does not inform our analysis.

2. Abraham v. Dep't of Labor & Indus., 178 Wash. 160, 34 P.2d 457 (1934). This opinion nowhere uses the terms "collateral estoppel" or "res judicata." It is, instead, a decision concerning whether the Department acted properly in vacating its own decision (akin to a court vacating its own judgment). It does not inform our analysis.

3. Luton v. Dep't of Labor & Indus., 183 Wash. 105, 48 P.2d 199 (1935). A case similar to Abraham. After a compensation award became final, the Department unilaterally cancelled it. The opinion nowhere uses the terms "collateral estoppel" or "res judicata," instead discussing principles applicable to vacations of judgments. It does not inform our analysis.

4. Ek v. Dep't of Labor & Indus., 181 Wash. 91, 41 P.2d 1097 (1935). This is a case with the result the City desires The opinion is brief, and self-admittedly scant in analysis. It does not mention "collateral estoppel" or "res judicata." Nor does it apply the four-part res judicata analysis. It does, however, observe that "a judgment is binding upon the party against whom it runs." Ek, 181 Wash. at 94. Does this mean that the four-part res judicata test, for some reason, does not apply when workers' compensation is involved? We think not.

Indeed, Ek's cursory analysis is hard to square with then-existing case law, if Ek is indeed a res judicata decision.

The four-part res judicata analysis was announced as the law of Washington in 1918. N. Pac. Ry. Co. v. Snohomish County, 101 Wash. 686, 688, 172 P. 878 (1918). This was 17 years prior to the Ek decision. Soon after the Ek decision, the Supreme Court issued a decision which it explicitly announced as turning on the application of res judicata. Clubb v. Sentinel Life Ins. Co., 197 Wash. 308, 310, 85 P.2d 258 (1938). The Clubb court explicitly applied the four-part res judicata analysis. Years later, the Supreme Court applied the four-part analysis in a res judicata case involving a workers' compensation decision. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

It may be that Ek was not a res judicata case. It may be that Ek's analysis, as cursory as it was, was simply aberrant. What is clear is that for 100 years the four-part res judicata analysis

V

Weaver's application for permanent total disability benefits is not barred by collateral estoppel or by res judicata. In so concluding, we do not intend to suggest that an issue in a workers' compensation action can never be subject to collateral estoppel. Indeed, there may be circumstances in which a worker had an incentive to fully litigate the issue in an initial proceeding but did not.

In addition, our decision in this matter does not indicate that res judicata can never bar a subsequent petition for compensation in a workers' compensation matter. Indeed, we can easily conceive of circumstances involving the same subject matter where the worker did, could have, or should have litigated the subject matter in an earlier proceeding.

However, the laws of preclusion do not rightfully apply to Weaver's application. As elucidated by Washington's foremost scholar on civil procedure, Professor Trautman,

> [t]here is danger that in seeking to relieve the crowded dockets and backlog of litigation, courts will too readily turn to the rules of res judicata and collateral estoppel. It is critical to remember that the doctrines of claim and issue preclusion are court-created concepts. Accordingly, they can be adjusted to accommodate whatever considerations are necessary to achieve the final objective—doing justice.

Trautman, 60 WASH. L. REV. at 842.

By precluding Weaver from litigating the question of whether his employment caused his cancer, even though he lacked sufficient economic

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has been a component of the common law of Washington. It has been consistently applied by our Supreme Court for at least the past 8 decades. Accordingly, we apply it herein.

motivation to do so in the earlier proceeding, and by precluding him from litigating his application for permanent total disability benefits, when he could not possibly have brought that application in the earlier proceeding, the superior court did not grant Weaver the justice to which he was entitled under the Act.

Reversed.

Dwyer, J.

We concur:

Trickey, J

Spearman, J.

APPENDIX B

Language Preference Laotian Cambodian Other ____

515-000-656 | 0404-w | SG 1565

Business name of self insured employer: CITY OF EVERETT c/o Comprehensive Risk Management
Employer's address: 1520 Broadway, Suite 201
City: Everett, State: WA ZIP: 98201

Name of injured employee (First-middle-last): Michael Wade Weaver
Employee's home phone: (509) 607-(
Mailing address: P.O. Box 1775
Employer's phone #: (425) 257-8
City: Ellensburg State: Wa. ZIP: 98926
Social Security number: 449-04-878

Dependent Children include unborn, estimate birthdate.
Benefits will be based, in part, on number of legally dependent children. Please indicate custody status of each child.

Name	Relationship	Legal custody (select one)	Date of birth
Wade Weaver	Son	(Yes) No	8,13,01
Cole Weaver	Son	(Yes) No	6,1,03
Gage Weaver	Daughter	(Yes) No	7,23,08
		Yes No	/ /

Name of children's legal guardian, if other than self. Phone # ( )
Address
City State ZIP

Family status (select one): (Married) Single Widowed Separated Divorced Registered Domestic Partner
Sex: (M) F
Date of birth: 4/16/1968
Height: 68"
Weight: 220
Job title when injured: Fire fighter / Paramedic
Date of hire: 2/16/1996
Shift hrs: 24
When did you last work? 6,21,2
Date of injury/exposure: 6/22/2011
Time of injury: 1600 AM (PM)
When did you return to work? / /
Part of body injured or exposed: Scapula
Right / Left
Where did the injury or exposure occur? (Employer premises) Jobsite Parking Lot Other
Were you doing your regular job? Yes No
Was this incident caused by failure of a machine or product OR someone who is not a co-worker? (Select one) Yes No Possibly

Describe in detail how your injury or exposure occurred: (Include tools, machinery, chemicals or fumes that may have been involved)
On 6-22-2011 had mole removed from (L) scapula → sent to Biopsy - 6-25-2011 informed not to lift or wear pack → called in sick for 6-26-11. 6-28-11 Biopsy confirmed Melanoma 6-29-2011 Consult c̄ Dr. David Byrd @ Seattle Cancer Care Alliance. Discuss probability of Malignant Melanoma being a result of occupation of Firefighter for 15 plus years.

List any witnesses: Dr. Byrd, Spouse Amy Weaver, Dr Val

Did you report the incident to your employer? (Yes) No
Name/title of person reported to: Bonnie Nethery
Date reported: 6/29/
If reporting of incident was delayed, why? Did not find out about Biopsy of Malignant Melanoma
Business name and address where injury or exposure occurred: City of Everett Fire Department,
Address: 2811 Oakes
County: Snohomish
City: Everett State: Wa. ZIP code: 9822

Was your employer contributing to your and/or your family's medical, dental and/or vision insurance on the date you were injured? (Yes) No
Do you consistently work overtime? (Yes) No
Do you have more than one rate of pay? (Yes) No
Do you have more than one employer? Yes (No)

Have you ever been treated for same or similar condition before? Yes (No) If so, When?
Rate of pay at this job (Write amount, select one): $ 40.65 (Hour) Week Day Month
Hours/day: 24
Days/week: 2
Additional earnings (daily average) (Write amount, select one): $ 25.00 day Tips (Piecework) Commission
Did you receive a bonus within the last 12 months? Yes (No) $

Name of attending Health Care Provider: Dr. David Byrd
Address: 825 Eastlake Ave E.
City: Seattle State: Wa. ZIP: 98109

Medical Release authorization: Pursuant to RCW 51.36.060, I hereby authorize my health care provider, hospital, agency or organization to disclose to my employer or my employer's representative or the Dept. of Labor & Industries any relevant medical records or other information regarding treatment which has previously been furnished to me.
Today's date: 7,8,2011
Worker's Signature X [signature] #254EFD

I have read the legal notice on the reverse side of employee copy. I declare that these statements are true to the best of my knowledge and belief.
Today's date: 7,8,2011
Worker's signature X [signature] #254EFD

Employer Start here

Date last worked: 6-21-11 / 1623
Date returned to work: 6/24/11
Was employee engaged in the regular course of employment when injured? (select one) Yes No
Hourly rates of pay: $40.057/hr 24 hrs/dy 1-2 days/wk; $...../hr ..... hrs/dy ..... days/wk
Will you pay this employee full salary or wages during period of disability? (select one) Yes (No)
Monthly Salary $
Other, explain:
Average monthly value of all bonuses paid 12 months prior to injury $ 0
Do you agree with employee's description of the accident? If not, explain.

RECEIVED BY
JUL 18 2011
Comprehensive Risk Mgt

Average hrs including O/T worked: Hrs: Day Mo
Average daily earnings from piecework, tips and commissions as reported $ 0
If seasonal part time or intermittent, provide 12 months gross wages $
L&I use only

RECEIVED
JUL 11 2011
Labor Relations/HR

Fatality Yes (No)
Date reported to employer: 6/29/11
3rd party involved? Yes No
Were you contributing to this worker's and/or family's medical, dental and or vision insurance on date of injury? (Yes) No
If so, how much did you pay? 995.14 2WK Per Mo.
When will your contribution end? / /

Worker's copy mailed: (Yes) No
Treatment only: Yes No date closure mailed / /
Treatment only ROR: Lt. duty provided Yes No Associated costs $
I declare that the foregoing statements are true to the best of my knowledge and belief
Date ____ Signature [signature]

F207-002-000 self insurer accident report - employer (2) 7-09

EXHIBIT "A" L&I'S COPY

APPENDIX C

JURISDICTIONAL HISTORY

Please review the Jurisdictional History and note any errors or additions. This is a summary of Department actions relevant to this appeal. The summary may not include every action taken by the Department. At the initial conference you will be asked to stipulate to the correctness of these facts for the purposes of establishing the Board's jurisdiction to hear the case and determine the issues to be resolved.

IN RE: MICHAEL W. WEAVER

CLAIM NO: SG-15654

DOCKET NO: 12 11709

Jurisdictional Stipulation

I certify that the parties have agreed to include this history in the Board record for jurisdictional purposes only.

☐ As Amended

Dated _____ at _____.

_____
Judge's Signature

FOR BOARD USE ONLY

MFP	DATE DOC/ ACTION	DOCUMENT NAME	ACTION/RESULT
1	7/19/11	AB	DOI 6/22/11, melanoma – City of Everett
	8/18/11	DO	This claim is allowed for the occupational disease on 6/22/11. The worker is entitled to receive medical treatment and other benefits as appropriate under the industrial insurance laws. (DET)
	9/12/11	P&RR	Employer (CM – rep) DO 8/18/11
2	1/3/12	DO	DO 8/18/11 is reversed and the following action taken: This claim is denied because: The worker's condition is not an occupational disease. The presumption of occupational disease in fire fighters does not apply.
	2/15/12	NA (12 11709)	Claimant (Meyers - atty) DO 1/3/12
	2/27/12	BD OGA (12 11709)	DO 1/3/12

2/27/12 km

EXHIBIT 1B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL W. WEAVER) DOCKET NO. 12 11709
)
CLAIM NO. SG-15654) PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Sara M. Dannen

APPEARANCES:

Claimant, Michael W. Weaver, by
Ron Meyers & Associates, PLLC, per
Ron Meyers

Self-Insured Employer, City of Everett, by
Keehn Kunkler, PLLC, per
Gary D. Keehn

The claimant, Michael W. Weaver, filed an appeal with the Board of Industrial Insurance Appeals on February 15, 2012, from an order of the Department of Labor and Industries (the "Department") dated January 3, 2012. In this order, the Department denied the claim and found that the presumption of occupational disease in firefighters does not apply. The Department order is **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

On April 5, 2012, the parties agreed to include the Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this appeal.

The claimant presented the testimony of Kenneth H. Coleman, M.D., by way of perpetuation deposition taken on August 8, 2012. This deposition is published in accordance with WAC 263-12-117 with all objections overruled and all motions denied except that the objections at page 41, lines 9-11, and page 54, line 2, which are sustained. The request for judicial notice (page 41, lines 10-25, and page 42, lines 1-8), is stricken. Deposition exhibits 1-13 were not offered, will not be considered in this Proposed Decision and Order, and will remain with the deposition.

During the September 11, 2012 hearing, the claimant, through legal counsel, waived presentation of the remainder of his previously named witnesses, to wit: Pam Evans, Tony Patricelli, John Tanaka, and David Aboulafia, M.D.[1]

[1] 9/11/12 Tr. at 75.

EXHIBIT 1C

The employer, City of Everett (hereinafter "Everett") presented the testimony of Sonja Wright, ARNP, by way of perpetuation deposition taken on October 2, 2012. The deposition is published in accordance with WAC 263-12-117 without alteration as there were no objections therein.

The employer presented the testimony of Robert M. Levenson, Jr., M.D., by way of perpetuation deposition taken on October 3, 2012. The deposition is published in accordance with WAC 263-12-117 without alteration as there were no objections therein.

The employer presented the testimony of John P. Hackett, M.D., by way of perpetuation deposition taken on October 3, 2012. The deposition is published in accordance with WAC 263-12-117 without alteration as there were no objections therein.

At the October 1, 2012 telephone hearing regarding the Claimant's Motion to Exclude Cumulative Expert Witnesses and Testimony, Everett stipulated that Michael W. Weaver is a firefighter and does have cancer for purposes of RCW 51.32.185.

On October 15, 2012, Everett filed written correspondence with the Board indicating its intent to waive presentation of the testimony of David Byrd, M.D., and thereby rest its case.

ISSUE

Whether the claimant's melanoma arose naturally and proximately out of distinctive conditions of his employment as a firefighter for the City of Everett?

EVIDENCE PRESENTED

Michael W. Weaver

Michael Weaver has been a firefighter with the Everett Fire Department ("Everett Fire") since February 16, 1996. Mr. Weaver, a Caucasian with fair skin, blue eyes and blonde hair was born on April 16, 1968, in Sherman, Texas. Although he lived in Oklahoma and Arkansas for a brief period of time, he primarily lived in north Texas until he was 18 years old. Mr. Weaver played football and ran track during his youth. Following graduation, he joined the military, and then served as a guide in Montana. For three years, he lead bear hunts, fishing, and horseback trips in the Bob Marshall and Sawtooth Wilderness areas.

Mr. Weaver is a paramedic firefighter for Everett Fire. To become qualified for this position, he undertook 2,200 hours of training beyond the emergency medical training all firefighters take. He is assigned to a very busy station. When he's not entering buildings for search and rescue operations, or assigned to a particular patient, Mr. Weaver can be found on-scene assessing

EXHIBIT 1C

structures or setting up hoses. He has spent time on the engine, and participates in outdoor training.

Once, in a jesting response to Captain Rich's "white shirt or nothing" policy, Mr. Weaver wore no shirt during outdoor training. Mr. Weaver's point was that some firefighters use up to two or three shirts on a call, resulting in nothing suitable to wear by the time training occurs. As a result of his decision to go without a shirt, Mr. Weaver replied, "I did have a slight burn, maybe a little more than slight. It's been a long time now."[2]

Mr. Weaver related that his only major sunburn was when he was a young child, living in north Texas. He was unable to eat breakfast because his shoulders hurt so badly from sunburn. This occurred while he was living with his mother, who did not watch him carefully. Mr. Weaver was raised most of his life by his grandparents, and returned to live with his grandmother following the sunburn. His grandmother, a nurse, would "slather" him with a substance he assumes was aloe or sunscreen.

Mr. Weaver said he continued to care for himself in this fashion while serving in the army and when he wanted to be a cowboy. While serving in the second ranger battalion, Mr. Weaver wore full battle dress, which included pants, shirt, and a jacket to protect against sunburn. Soldiers would be disciplined for sunburn. He would wear long shirts and jeans, even in hot weather, while working in the fields or as an outdoor guide.

Mr. Weaver recalled always working at busy stations while with Everett Fire. While working, he would attend even the hazmat calls, because you never would know what you'd find until you got there. Because the wind changes during a fire, he would be exposed even when not at the front of the line. He recalled smelling like smoke for days, and finding soot in his nasal passages and after coughing.

Mr. Weaver's testimony regarding occupational exposures during fire suppression, overhaul, and salvage was consistent with Captain Shraunder. After 2007, Everett Fire employees received a second set of bunk clothes and were required for the first time to conduct what they called gross decontamination. There was also training regarding diesel exhaust. He testified that his occupation brought him into contact with diesel exhaust, polycarbons, and hydrocarbons. He responded to fires at hoarders' homes, grass fires, car fires, commercial fires, and dumpster fires.

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[2] 9/11/12 Tr. at 46.

EXHIBIT 1C

One third of Everett Fire calls were garage/residential structure fires. He is currently on paid administrative leave from Everett Fire Station 1.

Mr. Weaver was diagnosed with malignant melanoma on June 22, 2011. He has been treated at Kittitas Valley Medical Clinic and with Dr. Byrd. On July 6, 2011, Dr. Byrd surgically removed a 16 inch portion from his left scapula. He also took a lymph biopsy.

Richard R. Shraunder

Captain Richard R. Shraunder is a Captain with Everett Fire, where he has served for 24 years. Captain Shraunder worked for another Fire District for 9-12 additional years, and now trains Everett Fire and other firefighters. He has worked with Mr. Weaver for 15 years.

Everett Fire responds to approximately 20,000 alarms per year. Mr. Weaver is part of the Everett Fire search and rescue team. Mr. Weaver responds to all fire calls at his station. His duties include fire support and patient care.

Everett firefighters are often exposed to diesel exhaust while dressing for a call and on scene (the rigs must stay on to provide services during a call). Firefighters are exposed to other possible carcinogens on scene before they employ their self contained breathing apparatuses (the "SCBA"), and, after the SCBA have been removed, during overhaul. Overhaul is the post-fire process where walls, ceilings, and debris are removed to ensure extinguishment. Fans are typically used during this process to create positive pressure.

Captain Shraunder explained firefighters like Mr. Weaver return from calls to find any uncovered area on their bodies (i.e. neck, head, wrists, arms and legs) black from soot. Smoke and soot on the gear often contains hydrocarbons from burned plastic, and shifts last 24 hours. Until 2007, Everett firefighters were also exposed when they had to reuse dirty gear for subsequent calls during a shift.

Everett only monitors firefighter exposure to gas leaks. Garage fires are large source of chemical exposure for firefighters. Garage fire contents are assumed to be hazardous, and because the fires are considered "exterior," garage fires do not require the use of SCBA. Typically, even firefighters like Mr. Weaver, who remain toward the rear, will be exposed because the smoke goes everywhere during extinguishment. Commercial industrial fires are a second large source of hazardous chemical exposure, and Everett Fire responds to ammonia releases, hazardous sulfides, and ketone spills. Everett firefighters are exposed to polycyclic aeromatic hydrocarbons.

EXHIBIT 1C

Although Everett firefighters have encountered an evolving decontamination process, even a full hose-down fails to eliminate unseen particulates, and simply relocates the problem to the inside of the station.

Sunshine is another potential occupational hazard, according to Captain Shraunder. Whether exposed during outside firefighting, training, staging, or post-fire activities, firefighters are outside quite often. Members are trained routinely, and most training occurs outdoors, in Class B uniform (i.e. trousers, t-shirts, gloves, and eye protection). For a while, there was an Everett Fire policy of "white shirt or nothing," where firefighters were expected to wear either a white shirt or no shirt during training. The policy was designed to discourage on-shift firefighters from arriving at training in soiled clothing following a call. Mr. Weaver, who was cautious about sun exposure, wore long sleeved shirts.

Kenneth H. Coleman, M.D.

Kenneth H. Coleman, M.D., is a medical doctor specializing in family practice and emergency room medicine. He has been certified by his peers in the former, but not the latter. Unless further investigation is not warranted, Dr. Coleman refers his cancer patients to an oncologist or dermatologist.[3]

Dr. Coleman is also a practicing attorney. Over the past 10-15 years, he has spent approximately 75 percent of his time in law (often as an expert medical witness), and 25 percent of his time in emergency and family-practice type medicine, where he works in somebody else's clinic.[4]

Dr. Coleman has not met with, examined, or treated the claimant. He did review Mr. Weaver's medical records and a spreadsheet of fire data management showing Mr. Weaver's professional activities. Dr. Coleman discussed 12 peer-reviewed journal articles which he feels demonstrate an association between firefighter occupational chemical exposure and an increased risk of certain cancers. Dr. Coleman relied upon the following articles in reaching his opinion, and believes they should be reviewed and considered by physicians rendering similar opinions:

1. Cancer incidence among Firefighters in Seattle and Tacoma, Washington;
2. Registry-Based Case-Control Study of Cancer in California Firefighters;
3. Cancer Incidence in Florida Professional Firefighters, 1981 to 1999;

[3] Coleman Dep. at 47.
[4] Coleman Dep. at 43-44.

EXHIBIT 1C

4. Cancer Incidence among Massachusetts Firefighters, 1982-1986;
5. Cancer Incidence among Male Massachusetts Firefighters, 1987-2003;
6. Cancer Risk among Firefighters: A Review and Meta-analysis of 32 Studies;
7. Organic Chemicals and Malignant Melanoma;
8. Nonsunlight Risk Factors for Malignant Melanoma Part I: Chemical Agents, Physical Conditions, and Occupation;
9. Environmental Factors and the Etiology of Melanoma;
10. Nonsolar Factors in Melanoma Risk;
11. Melanoma and occupation: results of a case-control study in The Netherlands; and
12. Textbook of Clinical Occupational and Environmental Medicine.

According to Dr. Coleman, several of these articles indicate that firefighting is an occupation associated with an increased risk of melanoma. The doctor also pointed out that although there is more than one cause of melanoma, the presence of one does not necessarily rule out the causal connection of the other. He was of the opinion that there was a causal connection between Mr. Weaver's diagnoses of malignant melanoma and his occupation as an Everett firefighter. When pressed, the doctor characterized the association between firefighter occupational exposure and malignant melanoma as "at least a weak or a moderate association."[5]

Dr. Coleman agreed with Drs. Levenson and Hackett that the following constitute as melanoma risk factors as well: moles, changes in pigmentation, hair and eye color, race/heritage, and exposure (particularly intermittent) to UV light. He also agreed that a carcinogen typically causes one or two, but not all types of cancer.

Marcella Lancaster

Ms. Lancaster still lives in Sadler, a city located in north Texas. Marcella Lancaster has known the claimant for over 30 years. She first met Mr. Weaver, then a student, while she was teaching. Her husband was his football coach, and her family became close with Mr. Weaver. Over the years, she saw Mr. Weaver one to two times per week. Mr. Weaver later hauled hay at their farm for a couple of weeks each summer. Although it was the end of the summer, and hot outside, Mr. Weaver would wear jeans, long sleeved shirts, and a hat. Ms. Lancaster doesn't believe she ever saw Mr. Weaver outside without long sleeves.

[5] Coleman Dep. at 59.

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From 1978 through 2002, Ms. Lancaster says she never saw Mr. Weaver sunburned, though she would see him almost every day. She last saw Mr. Weaver 10 years ago.

Sonja Wright, ARNP

Sonja Wright has been certified by her peers as an advanced registered nurse practitioner. She is currently employed by the Valley Clinic, an outpatient facility located in Ellensburg, Washington. Ms. Wright first treated Michael Weaver at her clinic on May 31, 2011, for a cough. The next visit, June 22, 2011, was for a mole located on his left upper back. The mole had been there for 20 years, but recently began changing. The mole had been looked at once before, but was not then cancerous. Mr. Weaver related a prior history of at least five sunburns (occurring at a young age), and declined a history of skin cancer. Ms. Wright did not recall Mr. Weaver mentioning getting a sunburn while training for the City of Everett Fire Department.

On physical examination, Ms. Wright found a black lesion on his left upper back. The lesion was 1.25 centimeters in size, and was round and raised. Biopsy revealed the mole was a malignant melanoma. Ms. Wright referred Mr. Weaver to Dr. Byrd of Seattle Cancer Care Alliance.

Robert M. Levenson, Jr., M.D.

Robert M. Levenson, Jr., is a medical doctor specializing and certified by his peers in internal medicine and medical oncology (i.e. cancer treatment).

Dr. Levenson testified that although there are certain known cancer-causing agents, exposure to those agents does not place an individual at risk for contracting the entire spectrum of cancers. Instead, generally speaking "certain toxic substances are associated with certain malignancies."[6] For example, exposure to asbestos is associated primarily with mesothelioma (malignant disease of the lining of the lung), and lung cancer. Asbestos is not a known risk factor for malignant melanoma. Further, there is no relationship between exposure to diesel fumes and the development of malignant melanoma. The doctor testified that he was unaware of associations between smoke fumes, toxic substances, and malignant melanoma, and that he was unfamiliar with literature based upon a finding of an association between chemical exposures and malignant melanoma.

Dr. Levenson met with Mr. Weaver on November 28, 2011, for an independent medical examination. His consultation with Mr. Weaver revealed a medical history mostly consistent with Mr. Weaver and Ms. Wright's testimony, but that included multiple blistering sunburns during

[6] Levenson Dep. at 8.

EXHIBIT 16

childhood. The doctor did not see evidence of a left scapula sunburn in Mr. Weaver's employment records and does not recall Mr. Weaver mentioning such a sunburn. Based upon his review of medical records and examination of the claimant, Dr. Levenson diagnosed Melanoma (cancer of the melanin-forming cells).

Dr. Levenson has reviewed and discussed the 12 articles introduced by Dr. Coleman. He agreed that firefighters may be exposed to polycyclic aromatic hydrocarbons and other potential toxins while suppressing fires. Dr. Levenson nevertheless opined that there was no relationship between Mr. Weaver's employment as an Everett firefighter and his development of malignant melanoma. Dr. Levenson believed that Mr. Weaver would have developed malignant melanoma, regardless of his employment with Everett, due to his fair skin, blonde hair, blue eyes, and his history of at least one, perhaps more, severe sunburns as a child. Put another way, it was Mr. Weaver's early frequent episodes of sunburn and sun exposure, rather than distinctive conditions of employment, that caused his melanoma.

This is because the most important sun exposure related to subsequent melanoma is repeated exposures (i.e. "blistering sunburns") during childhood.[7] Later sunburns bear less significance. Medical literature is not definitive regarding the development of malignant melanoma in firefighters.

Dr. Levenson answered a number of questions regarding cancer aggressiveness, categorization, metastasization, and patient prognosis. He was aware of Mr. Weaver's exposure to the toxic, and potentially carcinogenic, substances known as polycyclic aromatic hydrocarbons and benzenes. However, the doctor is unaware of the type, frequency, length, or intensity of Mr. Weaver's exposure to smoke fumes or toxic substances during his career at Everett.

The doctor disagreed that polycyclic aromatic hydrocarbons were associated with malignant melanoma, and knew of no possible association between malignant melanoma and chemicals or pollutants like vinyl chloride, polychlorinated biphenyls, or petrochemicals. He and was unfamiliar with any association between malignant melanoma and trichloroethylene solvents, dioxin, polyvinyl chloride, and pesticides known as mancozeb, parathion, and carbaryl. The doctor said these substances are not known as tumor accelerants or something that might make a benign tumor become malignant. In fact, the doctor was aware of no environmental exposure that might accelerate such a change,

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[7] Levenson Dep. at 26.

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John P. Hackett, M.D.

John P. Hackett is a medical doctor specializing and certified by his peers in internal medicine and dermatology. He discussed some of the multiple types of skin cancer. He testified to a continual advancement in knowledge regarding the diagnosis, treatment, and causation of skin cancers within his field of dermatology.

Dr. Hackett reviewed medical records and met with Michael Weaver on November 28, 2011, as part of an independent medical examination. During examination, Mr. Weaver did not give a history of significant sun exposure while employed as a firefighter. But Dr. Hackett was aware that Mr. Weaver had a history of multiple painful sunburns that required cold, wet towels.

Dr. Hackett's testimony regarding risk factors for malignant melanoma mirrored Dr. Levenson's. When examining a patient, Dr. Hackett considers factors such as how the tumor feels and how long it has been present. He looks at patient eye color, hair color, skin composition, ethnicity, and history of sun exposure. Although intermittent exposure is trumped by childhood sunburns and southern exposure (i.e. exposure by southern residents),[8] the doctor said episodic adult sun exposure also makes a difference:

> The office worker who spends two weeks in Hawaii or the Caribbean on[c]e or twice a year and gets a burst of sun that he's not prepared for probably is at a bit more risk.[9]

According to Dr. Hackett, 85-95 percent of the causes of malignant melanoma are understood. Very few of the remainder have been statistically tested and proven and demonstrated in large numbers. Although there are some theories that incredible exposures to various chemicals, pesticides, petroleum products, and agricultural products may cause melanoma, the only chemical with solid evidence as a carcinogen is arsenic (found in insecticides in the tobacco industry and in well water), which causes squamous cell carcinoma.[10]

Dr. Hackett said there is no peer-reviewed medical literature identifying diesel fumes with melanoma. Further, he was unaware of anything in the medical literature which indicated that firefighters were at greater risk of contracting malignant melanoma as a result of their exposures during their fire suppression activities.

Addressing Dr. Rosenstock's 1993 study (Coleman deposition exhibit 1), Dr. Hackett noted:

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[8] Hackett Dep. at 22.
[9] Hackett Dep. at 16.
[10] Hackett Dep. at 32.

EXHIBIT \ C

> If the firefighter by virtue of his occupational exposure was getting melanoma you would expect the rate to increase with time of exposure. It should go as a fairly straight line. And a 30-year guy would have more melanomas than a 15-year guy or a 20-year guy. That is not the case here.
>
> What you're looking at is the natural history of melanoma: peaks around 40 to 45, then tails off.[11]

Considering Mr. Weaver's history of childhood sun exposure and ongoing intermittent outdoor exposure, Dr. Hackett opined that Mr. Weaver would have developed the malignant melanoma even if he was never employed as a firefighter. Dr. Hackett testified that there was a "very little possibility" that Mr. Weaver's malignant melanoma was related to the distinctive conditions of his employment as a firefighter.[12] Further, Dr. Hackett said there was neither a reason nor medical evidence to believe that Mr. Weaver's distinctive conditions of employment as an Everett firefighter aggravated or accelerated his malignant melanoma.

On cross-examination, the doctor answered a number of questions regarding melanoma mitotic rates, aggressiveness, rate of growth, metastesization, and deadliness.

DECISION

The issue on appeal is whether the Department's order was correct on the date it was issued. *Pybus Steel Co. v. Department of Labor & Indus.*, 12 Wn. App. 436, 438 (1975), *citing, Hyde v. Department of Labor & Indus.*, 46 Wn.2d 31 (1955). The appealing party generally has the burden of presenting a prima facie case for relief sought in an appeal. *See* RCW 51.52.050. However, in this case, RCW 51.32.185 provides that in the case of firefighters, there shall exist a prima facie presumption that cancer is an occupational disease under RCW 51.08.140. This presumption may be rebutted by a preponderance of the evidence.

Here, because the employer stipulated that Mr. Weaver was a "firefighter" diagnosed with "cancer," as defined in RCW 41.26.030, Everett bears the burden of rebutting the presumption established by that statute.

Everett has satisfied this burden. The opinions of Drs. Levenson and Hackett, individually and collectively establish, by a preponderance of the evidence, that Mr. Weaver's malignant melanoma was not an occupational disease. Considering the breadth of experience and demonstrated knowledge these doctors had within their respective fields of oncology and dermatology, I find their

[11] Hackett Dep. at 33-34.
[12] Hackett Dep. at 18.

EXHIBIT 1C

testimony, whether considered collectively or individually, to far outweigh the conflicting opinion of Dr. Coleman, particularly in light of the doctor's concession that he typically refers his own cancer patients to an oncologist or dermatologist.[13]

Dr. Levenson testified that although there are certain known cancer-causing agents, exposure to those agents does not place an individual at risk for contracting the entire spectrum of cancers. Dr. Coleman agreed with this proposition. Instead, certain substances are associated with certain malignancies. For example, occupational exposures to arsenic would be associated with squamous cell carcinoma. Drs. Levenson and Hackett agreed that there is no established relationship between diesel fumes and malignant melanoma.

All medical witnesses agreed that eye color, hair color, and lighter skin tones were at higher risk for the development of malignant melanoma. Drs. Levenson, Hackett and Coleman agreed that intermittent exposure to sunlight was a known risk factor. According to Dr. Hackett, an office worker getting a burst of sun while on a two week vacation would amount to episodic exposure.

Here, although Mr. Weaver apparently had one day of sun exposure during Everett Fire training exercises, he only burned slightly. I find that this slight burn, obtained during a one-day training exercise, does not constitute episodic or intermittent exposure significant enough to amount to a cause of the claimant's malignant melanoma.

On the other hand, I find that Mr. Weaver suffered at least one serious sunburn as a young boy growing up in north Texas. Dr. Levenson, an oncologist, testified that the most important sun exposures related to melanoma occur during childhood. According to Dr. Levenson, Mr. Weaver would have developed malignant melanoma, regardless of his employment with Everett, simply due to his skin, hair, and eye colors, and his history of severe sunburn. Dr. Hackett agreed, adding that Mr. Weaver's southern location during childhood did not help.

Considering this history, and certainly aware of the articles relied upon by Dr. Coleman, Dr. Levenson further testified that although firefighters are exposed to polycyclic aromatic hydrocarbons and other potential toxins during fire suppression, there was no relationship between Mr. Weaver's employment as an Everett firefighter and his development of the cancer. In fact, the oncologist knew of no associations between malignant melanoma and polycyclic aromatic hydrocarbons.

[13] Coleman Dep. at 47.

EXHIBIT 1C

Dr. Coleman relied upon such an association which he says was supported by the studies introduced in his testimony. But, Dr. Hackett identified flaws in one of the studies, and Dr. Coleman himself was forced to make several admissions on cross-examination which, in my view, severely undercut his reliance upon the studies.

Certainly cancer research is ongoing. Today, only 85-95 percent of the causes of malignant melanoma are known. I have no doubt that in 50 years at least some of today's hypotheses will clear the crucible of scientific testing to become tomorrow's "known causes." But, I cannot today make a finding that the distinctive conditions of Mr. Weaver's employment were even a proximate cause of his malignant melanoma simply because unknown causes exist. Further, I cannot find the "weak or a moderate association"[14] proffered by Dr. Coleman sufficient in light of the undisputed risk factors present, and in light of the very credible testimony offered against it. The Department order must be affirmed.

Considering my decision regarding claim allowance, the issue of appeal costs, including attorney and witness fees, pursuant to RCW 51.32.185(7)(a) is moot.

FINDINGS OF FACT

1. On April 5, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Michael W. Weaver has worked as a paramedic firefighter since February 16, 1996. His duties include attending periodic training exercises, suiting up for calls, and responding to non-fire (i.e. EMT) and fire calls. Mr. Weaver has responded to fires at hoarders' homes, grass fires, car fires, commercial fires, garage and residential structure fires, and dumpster fires.

3. Once on-scene, Mr. Weaver's duties include conducting search and rescue operations, performing patient care, setting up fire hoses for the front lines, and assessing structures during post-suppression overhaul. During overhaul, Mr. Weaver must enter structures for long periods of time, often without the assistance of self-contained breathing apparatuses.

4. Mr. Weaver's work as a firefighter exposes him to smoke, soot, particulates, chemicals, vehicular exhaust, and gases. Some of these exposures are hazardous. He is also exposed to sunshine.

[14] Coleman Dep. at 59.

EXHIBIT 10

5. Michael W. Weaver is a fair-skinned Caucasian man with blue eyes and blonde hair. He spent a majority of his youth in north Texas. After he graduated from high school, he joined the military and then spent three years as an outdoor guide in the Bob Marshall and Sawtooth Wilderness areas.

6. Mr. Weaver suffered at least one serious sunburn as a youth, but otherwise took precautions such as wearing long clothing or using sunblock to avoid sunburn. He suffered one slight burn as an adult after refusing to wear a shirt during a training exercise with the Everett Fire Department.

7. Michael Weaver's condition, diagnosed as melanoma, did not arise naturally and proximately out of the distinctive conditions of his employment with the City of Everett Fire Department.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The statutory presumption of occupational disease embodied in RCW 51.32.185 has been rebutted by a preponderance of the evidence.

3. The claimant's condition of melanoma is not an occupational disease within the meaning of RCW 51.08.140.

4. The order of the Department of Labor and Industries dated January 3, 2012, is correct, and is affirmed.

DATED: JAN 15 2013

/ACIAS FOR

SARA M. DANNEN
Industrial Appeals Judge
Board of Industrial Insurance Appeals

EXHIBIT 1C

APPENDIX D

Worker Start Here

SELF INSURER ACCIDENT REPORT (SIF-2)

(circle one) Language Preference: English Spanish Russian Korean Chinese Vietnamese Laotian Cambodian Other

UBI: 313 000 656 | Risk class | CLAIM NUMBER: SH 28667

Business name of self insured employer	Name of injured employee (First-middle-last)	Employee's home phone
CITY OF EVERETT c/o Comprehensive Risk Management	MICHAEL WADE WEAVER	(509) 607-0630
Employer's address 4716 - 61st St. NE	**Mailing address** PO BOX 1775	**Employer's phone #** ( )
City Marysville, WA **State** **ZIP** (425) 252-7623	**City** ELLENSBURG, WA **State** **ZIP** 98926	**Social Security number** 449-04-9785

Dependent Children include unborn, estimate birthdate.
Benefits will be based, in part, on number of legally dependent children. Please indicate custody status of each child.

Name	Relationship	Legal custody select one	Date of birth
WADE WEAVER	SON	(Yes) No	8/13/01
COLE WEAVER	SON	(Yes) No	6/1/03
GAGE WEAVER	DAUGHTER	(Yes) No	7/23/08
		Yes No	/ /

Family status select one: (Married) Single, Widowed, Separated, Divorced, Registered Domestic Partner

Sex: (M) F | Date of birth: 4/6/1968 | Height: 6'0" | Weight: 220

Job title when injured: FIREFIGHTER / PARAMEDIC

Date of hire: 2/16/1996 | Shift hrs | When did you last work? / /

Date of injury/exposure: 1994 FORWARD/1-6-14 | Time of injury Select one AM PM | When did you return to work? N/A / /

Name of children's legal guardian, if other than self. | Phone # ( )

Address | City | State | ZIP

Part of body injured or exposed: UPPER BACK/SCAPULA AREA, W/ LANCER SPREADING TO BRAIN | Right Left

Where did the injury or exposure occur? (Employer premises) Other: Parking Lot, Other | Were you doing your regular job? (Yes) No

Was this incident caused by failure of a machine or product OR someone who is not a co-worker? Select one Yes (No) Possibly

Describe in detail how your injury or exposure occurred:
(Include tools, machinery, chemicals or fumes that may have been involved)

SUN EXPOSURE DURING OUTDOOR FIREFIGHTING AND TRAINING FROM 1994 FORWARD

List any witnesses

Did you report the incident to your employer? (Yes) No
Name/title of person reported to: BOB DOWNEY | Date reported / /

If reporting of incident was delayed, why?
VARIOUS WORK, FIREFIGHTING +

Business name and address where injury or exposure occurred
TRAINING SITES UTILIZED BY CITY OF EVERETT F.D., 1994-PRESENT

Address | County | City | State | ZIP code

Was your employer contributing to your and/or your family's medical, dental and/or vision insurance on the date you were injured? (Yes) No

Do you consistently work overtime? (Yes) No

Do you have more than one rate of pay? (Yes) No

Do you have more than one employer? Yes (No)

Have you ever been treated for same or similar condition before? (Yes) No If so, When?

Rate of pay at this job: Write amount, select one (Hour) Week Day Month: $ 40.05

Hours/day: 24 | Days/week: 2

Additional earnings (daily average): Write amount, select one Tips Piecework Commission: $

Did you receive a bonus within the last 12 months? Yes (No) $

Name of attending Health Care Provider: DAVID ABOULAFIA
Address: VIRGINIA MASON MEDICAL
City: SEATTLE | State: WA | ZIP

Medical Release authorization: Pursuant to RCW 51.36.060, I hereby authorize my health care provider, hospital, agency or organization to disclose to my employer or my employer's representative or the Dept. of Labor & Industries any relevant medical records or other information regarding treatment which has previously been furnished to me. Today's date: 7/18/2014
Worker's signature: X

I have read the legal notice on the reverse side of employee's copy. I declare that these statements are true to the best of my knowledge and belief. Today's date: 7/18/2014
Worker's signature: X

Employer Start here

Hourly rates of pay
$ ..... /hr ..... hrs/dy ..... days/wk
$ ..... /hr ..... hrs/dy ..... days/wk

Will you pay this employee full salary or wages during period of disability? select one Yes No

Date returned to work: / /

Was employee engaged in the regular course of employment when injured? select one Yes No

Monthly Salary $
Other, explain:

Average monthly value of all bonuses paid 12 months prior to injury $

Do you agree with employee's description of the accident? If not, explain.

Average hrs including O/T worked: Hrs: Day Mo

If seasonal part time or intermittent, provide 12 months gross wages: $

Average daily earnings from piecework, tips and commissions as reported to IRS: $

L&I use only

Fatality: Yes No | Date reported to employer: / / | 3rd party involved? Yes No

Were you contributing to this worker's and/or family's medical, dental and or vision insurance on date of injury? Yes No

If so, how much did you pay? Per Mo.

When will your contribution end? / /

Worker's copy mailed: Yes No

Treatment only: Yes No; date closure mailed / /

Treatment only ROR: Lt. duty provided Yes No; Associated costs $

I declare that the foregoing statements are true to the best of my knowledge and belief.

Date / / Signature

F207-002-000 self insurer accident report - employer (sif-2) rdp 7-09

L&I'S COPY

EXHIBIT 9C

APPENDIX E

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL W. WEAVER	)	DOCKET NO. 15 10293
	)	
	)	ORDER ESTABLISHING LITIGATION
CLAIM NO. SH-28667	)	SCHEDULE

The parties appeared before me at a conference on March 31, 2015. The following people participated in the conference:

APPEARANCES:

Claimant, Michael W. Weaver, per
T. Jeffrey Keane

Self-Insured Employer, City of Everett, by
Keehn Kunkler, PLLC, per
Kathy Gallagher, Legal Assistant

JURISDICTION

The parties stipulated to the admission of the Board's Jurisdictional History to the record for jurisdictional purposes. I find the Board has jurisdiction over the parties to and subject matter of this appeal.

ISSUES PRESENTED

1. Should the Department have accepted Mr. Weaver's condition as an occupational disease?

2. Does the fireman presumption apply to Mr. Weaver's condition?

DISCOVERY

Discovery must be completed by October 2, 2015. This includes the minimum time allowed by the Civil Rules for a party to respond to a discovery request. Interrogatories and requests for production must be served no later than 30 days prior to October 2, 2015.

WITNESS CONFIRMATION

Each party must send a letter to me and the other parties stating:

- The name of the witness(es), including those presented by deposition
- The date, time, and location where all witness(es) will testify

The letter must confirm that all witnesses have actually been contacted and arrangements have been made for them to testify, either at hearing or by deposition. The parties should let me know if they will not use all reserved hearing time.

Send the letter to the other parties at the addresses listed on the last page of this order and to me at:

Board of Industrial Insurance Appeals
2815 Second Ave., Suite 550
Seattle, WA 98121

Parties are expected to begin to identify and schedule witnesses immediately. Witnesses and their scheduled hearing/deposition time not confirmed by a party's confirmation deadline will be canceled.

If a party cannot confirm witnesses by the deadline, they must send a written request for an extension to me **before the confirmation deadline.** Motions requesting extensions must be supported by facts showing good cause, including a description of the efforts made to schedule witnesses beginning the date of the conference.

DEPOSITIONS

Any depositions for the perpetuation of testimony must be taken in conformity with WAC 263-12-117. Any exhibit identified at a deposition must be offered. Any exhibit not offered into evidence will not be considered.

The parties must ensure that court reporters file depositions in a timely manner. Depositions shall be filed at the Board offices in Seattle (address above). An electronic copy of the deposition must also be submitted. Our website (www.biia.wa.gov) contains the electronic filing link to facilitate court reporter and party compliance with this requirement. Depositions not filed by the deadline set forth below will not be published.

Requests for extensions of deposition deadlines must be sent to me in writing **before the deposition deadline**. Motions requesting extensions must be supported by facts showing good cause.

REBUTTAL

A motion for rebuttal must be in writing and filed no later than 10 days after the date of the last hearing, or the date of last perpetuation deposition, whichever is later. Failure to file a timely motion will result in the motion being denied.

TELEPHONE PROCEEDINGS

Testimony can be taken by telephone if the parties agree. If there is no agreement, I must approve any request to take telephone testimony.

EXHIBITS

Whenever possible, exhibits should be submitted on paper $8^1/_2$" x 11" in size. A larger version may be shown to the judge or witness for purpose of demonstration and a smaller version marked and offered as the exhibit.

If an exhibit is in an electronic format that cannot be printed, such as a video or audio recording, the party proposing the exhibit must:

1) Provide the exhibit in a storable format (such as a DVD, CD, CD-R, thumb drive/flash drive) using a Windows operating system that can be kept by the Board as part of the official record; and
2) Supply the device necessary to view or hear the exhibit at the hearing. Failure to do so will result in rejection of the exhibit.

The Board reserves the right to reject, at any time, an electronic exhibit that contains harmful software, viruses, or any other items that may harm the agency's network or electronic equipment.

The Board will **not** accept any hazardous exhibit. A hazardous exhibit is an exhibit that threatens the health and safety of persons handling the exhibit, including exhibits having potentially toxic, explosive, or disease-carrying characteristics. Photographs, videotapes, or other facsimile representations may be used to demonstrate the existence, quantity, and physical characteristics of hazardous evidence.

If a party is uncertain whether a proposed exhibit is in compliance with this requirement, the party must request a conference with the judge, to make a determination of compliance, at least fourteen days before submitting the exhibit. *See* WAC 263-12-116.

PERSONAL IDENTIFIERS

Before filing with the Board, parties shall remove personal identifiers from all exhibits marked for admission at hearing, unless the information is relevant. Personal identifiers include social security numbers, financial account numbers, and driver's license numbers.

PRESENTATION OF EVIDENCE

With the conclusion of live testimony and with the publication of depositions, each party's case will be completed.

At the following dates, times, and locations, the **claimant** will call the following witness(es):

Date/Time	Witness(es)	Location
11/3/15 & 11/4/15 9:00a – 4:00p	10 unidentified lay witnesses 3 unidentified expert witnesses (some by deposition)	Seattle

Witness Confirmation Deadline: October 16, 2015

Deposition Deadline: Perpetuation depositions must be taken by November 2, 2015, and shall be filed by December 18, 2015.

At the following dates, times, and locations, the **self-insured employer** will call the following witness(es):

Date/Time	Witness(es)	Location
11/18/15 9:00a – 12:00p	2-3 unidentified lay witnesses 3 unidentified medical witnesses (by deposition)	Seattle

Witness Confirmation Deadline: October 27, 2015
Deposition Deadline: Perpetuation depositions must be filed by December 18, 2015.

Requests for continuances must be sent to me in writing, supported by facts showing good cause.

CONDUCT AT PROCEEDINGS

We have the following expectations of participants at proceedings:

- **Be courteous to staff.**
- **Stay in the waiting/reception area until you are called to the assigned room.**
- **If there is no waiting area, go directly to the room.**
- **Facility phones, fax/copy machines, and coffee are not for general use.**
- **Be sure conversations and cell phone use do not disturb others.**

Attorneys and representatives: Please convey this information to your witnesses.

Dated: March 31, 2015

Mychal H. Schwartz
Industrial Appeals Judge
Board of Industrial Insurance Appeals

CL1

MICHAEL W. WEAVER
PO BOX 1775
ELLENSBURG, WA 98926-1775

CA1

T. JEFFREY KEANE, ATTY
100 NE NORTHLAKE WAY #200
SEATTLE, WA 98105

EM1

CITY OF EVERETT
CITY HALL
2930 WETMORE AVE #6A
EVERETT, WA 98201

EA1

GARY D. KEEHN, ATTY
KEEHN KUNKLER, PLLC
810 THIRD AVE #730
SEATTLE, WA 98104

AG1

OFFICE OF THE ATTORNEY GENERAL/TUMWATER
DOCKET MANAGER
PO BOX 40121
OLYMPIA, WA 98504-0121

PRATT, DAY AND STRATTON, PLLC

August 15, 2018 - 3:30 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Michael Weaver, Appellant v. City of Everett, Respondent (763245)

The following documents have been uploaded:

- PRV_Cert_of_Service_20180815152429SC098004_6424.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was Certificate of Service Pet for Review City of Everett.pdf
- PRV_Petition_for_Review_20180815152429SC098004_3982.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review City of Everett.pdf

A copy of the uploaded files will be sent to:

- alexanderj@atg.wa.gov
- anas@atg.wa.gov
- dmp@tjkeanelaw.com
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TACOMA, WA, 98406-2550
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