

**No. 96189-1**

NO. 76324-5-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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MICHAEL WEAVER

Appellant

v.

CITY OF EVERETT, DEPARTMENT OF  
LABOR AND INDUSTRIES

Respondent

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**BRIEF OF APPELLANT**

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KEANE LAW OFFICES  
T. Jeffrey Keane, WSBA 8465  
100 NE Northlake Way, Suite 200  
Seattle, WA 98105  
206/438-3737 / fax 206/632-2540  
Email: [tjk@tjkeanelaw.com](mailto:tjk@tjkeanelaw.com)

Attorneys for Appellant

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## I. INTRODUCTION

This case presents a single overriding question: does a worker's failure to establish that a minor skin cancer was caused in part by his occupation---and which condition was readily and easily treated resulting in a quick return to work---preclude that worker from making an occupational disease claim when the cancer later metastasizes to his brain, and causes him mortal harm?

The Department of Labor & Industries, the Board of Industrial Insurance Appeals, and the superior court ruled that Washington law commands that result, after applying claim preclusion principles. Such principles are to be equitably applied. Yet there is nothing equitable about the declination of a modest claim later precluding a terminal illness claim when the worker becomes that statistically rare person whose excised melanoma eventually causes his brain cancer.

Michael Weaver was a firefighter and EMT for the Everett Fire Department for eighteen years. Part of his required training included outdoor sessions under the summer sun. In June, 2011, Mr. Weaver was diagnosed with a modest melanoma on his upper back. The melanoma was removed, Mr. Weaver missed a few weeks of work, and he returned to further service for the fire department. Nothing in the record indicates that Mr. Weaver knew, or was ever told, that his scapular melanoma might return in a different form.

The trial court erred in three ways. First, Mr. Weaver's present case involving a fatal cancer does not involve the same subject matter as his prior case involving an excised skin lesion. Second, due to the puny potential recovery in his prior case, Mr. Weaver did not have an incentive to fully litigate it. Lastly, barring the present claim—while relying upon equitable claim preclusion principles no less--will work an injustice. This result cannot stand.

## **II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES**

### **a. Assignments of Error**

1. The trial court erred by deciding that the present case involves the same subject matter as Mr. Weaver's prior case.
2. The trial court erred by concluding that Mr. Weaver had an incentive to fully litigate his prior case, even given its modest scale.
3. The trial court erred in deciding that rejecting this claim will not work an injustice.

### **b. Issues Pertaining to Assignments of Error**

1. Does the doctrine of collateral estoppel bar Mr. Weaver's present claim? (Assignments of error 2 and 3).
  - a. Does Mr. Weaver's present case involve the identical issue as his prior case?
  - b. Will barring Mr. Weaver's present claim work an injustice?
2. Does the doctrine of *res judicata* bar Mr. Weaver's present claim? (Assignment of error 1)
  - a. Does the present case involve the same subject matter as the prior case?
  - b. Does the present case involve the same cause of action as the prior case?

### III. STATEMENT OF THE CASE

a. Description of Mr. Weaver's prior claim for temporary total disability benefits

Michael Weaver worked as a firefighter and EMT for the Everett Fire Department from 1996 until January, 2014. The Everett Fire Department required firefighters to participate in various training exercises two to four times per month. CABR 104. All training sessions were conducted at the Everett Fire Department Drill Field. CABR. 100, 104. At the drill field, there was a single building in the middle of the field, which was part grass and part asphalt. CABR. 105. During summer drills, there was little shade. Id. Mr. Weaver trained with his shirt off, as allowed. CABR. 105, 107. Drills were strenuous and firefighters would take off their heavy gear, leaving some wearing a white t-shirt or no shirt at all. CABR. 100, 193. Mr. Weaver on several occasions developed sunburns while training as a firefighter. CABR. 100, 193.

A mole on Mr. Weaver's back was removed in June, 2011. A biopsy showed it was melanoma and excision of the lesion on his scapula followed. Mr. Weaver's total time off work for treatment and recovery was just over a month. CABR. 193. If recognized as a work related injury which made him eligible for time loss (total temporary disability benefits) payments, the total time loss benefits payable to Mr. Weaver would be less than \$10,000.00. Id.

Melanoma is a 'presumptive' illness when contracted by a firefighter in Washington. There is a presumption that the disease was occupationally caused. RCW 51.32.185(1). Employers can rebut this presumption with competent evidence. If the employer overcomes the presumption a claim can be denied.

Mr. Weaver filed a claim for temporary total disability benefits. CABR 193, 274. Initially, Mr. Weaver's claim was allowed as an occupationally caused condition. CABR. 274. Everett protested and requested that the Department review Mr. Weaver's claim for temporary total disability benefits. CABR 274. On January 3, 2012 the Department of Labor and Industries reversed its previous order and denied Mr. Weaver's claim. CABR 278.

With his former counsel, Mr. Weaver appealed the denial to the Board of Industrial Insurance Appeals. Curiously, little evidence was presented at the hearing regarding Mr. Weaver's easily proven occupational sun exposure. CABR 371, 376-378, 381. More was made of the various toxins fire fighters are exposed to, including diesel fumes. CABR 366-370, 372-374, 381-393. Mr. Weaver was skimpily prepared for the hearing. CABR 48-49. He received no instruction regarding his testimony. Id. He never prepared to testify with counsel. Id. And counsel appeared for the hearing 90 minutes late. Id. It is no surprise, then, that such a poorly prepared presentation resulted in employer prevailing. Id.

Nothing in the record suggests Mr. Weaver knew, or was ever informed, that his melanoma might return after excision. No evidence regarding the risk of such recurrence, or its potentially deadly effects, was presented. CABR 1-393.

After his skin lesion was removed on July 6, 2011, Mr. Weaver's subsequent exams over the next two and a half years did not reveal any additional cancer nor any reoccurrence of the melanoma. At no point throughout Mr. Weaver's treatment did anyone tell him that the cancer could in fact recur and cause mortal harm.

After he lost following his hearing, Mr. Weaver's lawyer withdrew. CABR 49. Mr. Weaver filed a *pro se* appeal to the superior court, but later dismissed it in December, 2013. CABR 49-50. By then, Mr. Weaver had returned to work, and had been working for 28 months.

b. **Mr. Weaver made a subsequent claim for permanent total disability benefits based upon presentation of a separate disease**

In early 2014 Mr. Weaver started having headaches and word finding problems. CABR 318-19. He returned to see Dr. David Aboulafia, an oncologist who had treated him previously in 2012. CABR 317. An MRI revealed a three centimeter mass in the left frontal lobe of Mr. Weaver's brain. CABR 319. Immediate surgery resulted in removal of the tumor, and the surgical pathology report showed that the tumor was metastatic melanoma. CABR 320. A later MRI showed two new growth sites near the

original site of the brain metastases. CABR 321. Post-surgery radiation therapy was provided and, later, immune therapy began. CABR 321, 323.

These ominous developments caused Mr. Weaver to file a new Labor & Industries claim for an occupationally caused metastatic melanoma. CABR 275. The Department rejected the claim—contending that the new disease was the same as the old disease and thus controlled by the prior rejection of Mr. Weaver’s first claim—and an appeal followed. CABR 67, 276.

There was little similarity between the presentation made during the first appeal regarding the scapular melanoma, and the appeal regarding metastatic brain melanoma. Mr. Weaver’s treating oncologist, Dr. Aboulafia, did not even testify at the first hearing. CABR 252. Dr. Aboulafia’s declaration in the second case fully supported Mr. Weaver’s claims. CABR 108-109. Dr. Aboulafia’s testimony is accorded special weight under Washington law. *Hamilton v. Dept. of Labor and Industries*, 111 Wash.2d 569, 570, 761 P.2d 618, 619 (Wash 1988).

There was scarce testimony regarding occupational sun exposure at the first hearing. CABR 49. The testimony of Dr. Kenneth Coleman, a hired expert for Mr. Weaver, spoke minimally of occupational sun exposure and causation of the scapular tumor. Although he is a medical doctor and has a law degree, Dr. Coleman has no recognized expertise in melanoma, particularly melanoma caused by occupational exposures. CABR 199-202.

During his appeal of the rejection of his metastatic melanoma claim, Mr. Weaver presented testimony from Dr. Andrew Brodtkin, an international authority of occupational medicine. CABR 134-166. Dr. Brodtkin is one of the editors of the *Textbook of Clinical Occupational and Environmental Medicine, 2nd Edition*, a leading textbook in the field of Occupational and Environmental Medicine. CABR 136. Dr. Brodtkin specifically edited chapters related to skin cancer, including melanoma, as well as the occupational health of firefighters. CABR 137.

Dr. Brodtkin has practiced in the area of occupational and environmental medicine for more than 24 years. CABR 147-149. He is a former head of the Harborview Occupational Medicine Department. CABR 152. He reviewed the medical and work site information generated during the second appeal, and opined that Mr. Weaver's cancer was a product of his workplace environment. CABR 137-138.

Dr. Brodtkin partially relied upon multiple occupational cancer studies in forming his opinions---specifically studies which compared the incidence of melanoma in the general population to the incidence of melanoma in firefighters. CABR 142-143 Firefighters have been observed to have “a statistically significant increased risk for melanoma[.]” Id. Mr. Weaver's occupational exposure to the sun during firefighter training sessions was witnessed by multiple coworkers who specifically remembered him training in the sun without a shirt. CABR 100, 105, 107.

At the earlier hearing, almost no such testimony was presented. CABR 49, 361-393. Dr. Brodtkin concluded that Mr. Weaver's practice of training outside in the sun lead to intermittent sunburns, which are the "pre-eminent risk factor for development of malignant melanoma[.]" CABR 143. In sum, Dr. Brodtkin concluded that: "Mr. Weaver's malignant melanoma was caused by his intermittent exposure to ultra-violet radiation (UVR) from sunlight as a firefighter between 1996-1998 and the early 2000's." CABR 144. Dr. Brodtkin further concluded that: "Mr. Weaver's repeated intermittent sunlight exposure with sunburn injury as a firefighter contributed to his cumulative lifetime risk for skin malignancy, and as such was a proximate and substantial contributing factor in the development of his malignant melanoma." CABR 145.

The contrast between what was at issue in the first appeal compared to the second appeal could hardly be more substantial. At most success in the scapular claim would have covered the cost of medical care (covered by employer paid medical insurance anyway), and a brief period of missed work. Success in the present case would be an award of permanent total disability benefits to Mr. Weaver and, in the event of his death from his present cancer, a pension for his widow. As Dr. Aboulafia has testified, the disease Mr. Weaver has leaves few survivors. The most likely outcome after a metastatic melanoma diagnosis is a 20 to 30 percent chance of being alive in two years. CABR 324. Even with that survival, the percentage of

continued survival shrinks further as time passes. CABR 324. Mr. Weaver is now 49 years old. His wife Amy is 46 years old; they have three minor children. CABR 194.

Despite these differences in significance and scale of disease, in health outcome, and in financial and health consequences, at every level where Mr. Weaver's brain cancer claim has been heard, it has been rejected, based upon "equitable" claim preclusion principles.

#### **IV. ARGUMENT**

##### **a. Scope of Review, and Standard of Review**

The scope of review for this court in worker's compensation appeals is "as in other civil cases." *Groff v. Dept. of Labor and Industries*, 65 Wash.2d 35, 41, 395 P.2d 633, 637 (1964). This claim has been rejected purely on legal grounds since Mr. Weaver was never permitted to present testimony in his case; he merely submitted evidence from his co-workers, from Dr. Aboulafia, and from Dr. Brodtkin, via declarations which were not given any evidentiary effect whatever. This court reviews questions of law *de novo*. *Rose v. Dept. of Labor and Industries*, 57 Wn.App. 751, 790 P.2d 201, *rev den* 115 Wn.2d 1010 (1990).

##### **b. Collateral Estoppel Does Not Bar Mr. Weaver's Present Claim**

###### **i. Mr. Weaver's prior and present case do *not* involve identical issues**

Collateral estoppel "bars relitigation of issues of ultimate fact that have been determined by a final judgment." *Williams v. Leone & Keeble*,

*Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). This doctrine—bounded by the need for judicial efficiency on one end, and by the avoidance of unfair and unjust results on the other—is intended to protect well-settled judicial results from contests anew.

Borrowing from a leading authority on civil procedure, the BIIA delineated how to approach use of the principle: the application of collateral estoppel “should be based on the importance of that issue, as recognized by the parties and judge at the first judgment, and the foreseeability of the significance of that issue in regard to subsequent legal actions at the time of the first action.” *In Re Keith Browne*, BIIA Dec., 06 13972 (2007), citing Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985). Thus, in considering its application, the court examining collateral estoppel must assure that the litigants and the court, in the first instance, appreciated the jeopardy of binding a later claim by the result in the first process. Indeed, such recognition by the “parties” and “judge” and, appreciation for the “foreseeability of the significance” of a first result, ought be present before the doctrine is applied.

Nothing in the record supports the application of collateral estoppel here. No mention is made by counsel, judge, or parties during the ‘scapular lesion’ hearing that the result in same would be binding upon Mr. Weaver---if ever his excised cancer returned anew to harm him.

The 'issue' before the first court was whether Mr. Weaver was eligible for nominal time loss benefits to cover his brief time away from work before returning, healthy. It was not whether his widow and minor children should be denied all compensation under worker's compensation laws following his death from an occupationally caused disease.

ii. **Application of collateral estoppel to Mr. Weaver's claim will work an injustice on Mr. Weaver and his family**

The doctrine of collateral estoppel (or issue preclusion) will not bar an action if application of the doctrine would work an injustice on the party against whom the doctrine is to be applied. *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600 (2001). "Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." *Id.* at 315. In *Hadley* the Supreme Court barred use of the doctrine because it was unjust to import a negative outcome in a minor proceeding against the initially losing party into a later, and more serious, proceeding arising from the same auto accident.

Maxwell's and Hadley's vehicles collided in an accident. *Id.* at 308-309. A state trooper issued an improper lane change traffic infraction citation to Maxwell. *Id.* Maxwell contested the citation at a hearing; the traffic court judge found that she had committed the infraction and fined her \$47. *Id.* at 309. Maxwell could have appealed that result to superior court, but she did not do so. *Id.*

Hadley later brought a personal injury action against Maxwell. 144 Wn.2d at 309. Giving collateral estoppel effect to the district court's decision concerning the traffic infraction, the superior court judge barred Maxwell from denying that she violated the lane-change statute—finding that the prior traffic court outcome ordained the outcome in the second, and more serious, tort case. *Id.* at 309-310. Using the prior finding in her case in chief, Hadley persuaded a jury that Maxwell was liable and the jury awarded substantial damages to Hadley. *Id.* at 310.

The Washington Supreme Court reversed. 144 Wn.2d at 315. It held that application of collateral estoppel on these facts worked an injustice on Maxwell. *Id.* at 312-315. The court held that the doctrine should be applied only if “the party against whom the estoppel is asserted [had] interests at stake [in the first proceeding] that would call for a full litigational effort.” *Id.* at 312 (quoting 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 373, at 763 (5th ed.1996)). “There must be sufficient motivation for a full and vigorous litigation of the issue.” *Id.* at 315. Since there was nothing more at stake in the underlying proceeding than a \$47 fine, the court held that Maxwell had little incentive to vigorously litigate the issue. *Id.* at 308, 312. It was therefore unjust to apply the doctrine against Maxwell. *Id.* at 315.

In a case even more analogous to the present one, the Colorado Supreme Court refused to apply the principle in the worker's compensation

setting, finding that the variable importance of different kinds of claim disputes will affect whether it is just to always bind the second proceeding by the outcome of the first.

In *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (2001), the claimant fell at work and received temporary total disability (TTD) benefits. *Id.* at 45-46. She recovered and then returned to work. *Id.* Her condition worsened, however, and she later made a renewed claim for TTD benefits. *Id.* at 46. Following a contested hearing, the administrative law judge found that the claimant was again temporarily and totally disabled and that her disability – both physical and psychological -- was caused by her fall at work. *Id.* at 46. The employer was ordered to pay TTD benefits. *Id.*

Later, however, Cooper requested permanent total disability (PTD) benefits, claiming that her temporarily disabling conditions had become permanently disabling ones. *Sunny Acres*, 25 P.3d at 46. During the claim hearing, the administrative law judge agreed that claimant was permanently disabled, but ruled that her work-related injury was not a significant factor contributing to her permanent total disability. *Id.* Applying collateral estoppel in holding that the employer was bound by the prior ruling that the disabling injuries occurred at work, the Colorado Court of Appeals reversed, and held that all of the elements of collateral estoppel were satisfied. *Id.* at 47. This meant that the initial finding that the injuries were

work-related was binding upon the court adjudicating Cooper's claim for permanent disability benefits. Id.

On appeal, the Colorado Supreme Court ruled that such an outcome unjustly punished an employer which, previously, had merely been contesting temporary benefits, not permanent ones. The court reasoned that collateral estoppel should not apply because the employer's incentive to litigate a temporary disability claim was too minimal in comparison to its incentive to litigate a claim for permanent benefits:

A party necessarily lacks the same incentive to defend where its exposure to liability is substantially less at the earlier proceeding. \* \* \* Temporary total disability benefits are limited to statutorily prescribed amounts and may extend only until the occurrence of certain statutorily prescribed events. Permanent total disability benefits continue until the death of the disabled worker. The difference in potential duration of benefits alone demonstrates the difference in exposure to an employer.

25 P.3d at 47-48.

Given the huge difference between the minimal amount at stake in a TTD claim and the very significant amount at stake in a PTD claim, the Sunny Acres court held that a prior finding on the issue of causation should never preclude litigation of that issue in the context of a PTD claim:

Because an employer always risks an award of substantially longer duration at a proceeding to determine permanent total disability than it does at a proceeding to determine temporary total disability, it never has the same incentive to vigorously litigate issues at the latter that it does at the former.

25 P.3d at 49.

The court added:

Because a claim for a temporary disability award does not present an employer with the same incentive to litigate as does a claim for a permanent award, issues presented with regard to the latter cannot be deemed fully and fairly litigated at a prior proceeding for the former.

25 P.3d at 45.

This case presents the same kind of distinction regarding whether an outcome in a ‘minor’ worker’s compensation benefits hearing should control the outcome in a ‘major’ benefits contest, when the difference between time loss benefits and a lifetime of pension benefits for the widow of a deceased worker is monumental.

Yet the trial court here, in upholding the BIIA’s denial of benefits, ignored the holding in *Sunny Acres*, even finding that it had “no persuasive effect” over Washington courts because “[t]he exact Colorado statutory scheme is not clear from the opinion.” CP 17. Simple review of the Colorado worker’s compensation statutes makes clear that Washington, and Colorado, share very similar schemes, making the *Sunny Acres* holding persuasive here.

At the time of the *Sunny Acres* decision Colorado and Washington had similar worker’s compensation statutory schemes, and continue to do so today (even after statutes in both states were amended).<sup>1</sup> Statutes in both

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<sup>1</sup> Colo. Rev. Stat. Ann § 8-43-303(1) (“At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a *change in condition*[.]” (emphasis added)); RCW 51.32.160(1)(a) (“If aggravation, diminution, or

states allow a claimant to reopen a claim for a ‘change in condition’ or ‘aggravation’ of an existing workplace related injury. But even with that framework, it was deemed unfair that the adverse outcome for the employer in the temporary benefits proceeding should bind the employer when, later, the stakes were much higher. *Sunny Acres*, 25 P.3d at 49. The Colorado Supreme Court noted that giving collateral estoppel effect to decisions on causation in TTD claims would have the deleterious effect of encouraging excessive and expensive litigation of relatively small claims. *Id.* at 49. The same logic applies when the aggrieved party is the claimant: Mr. Weaver, too, lacked sufficient incentive to litigate a minor claim in a large way, given the insignificant potential recovery, and further given the cost of hiring experts like Dr. Brodtkin, whose expert fees alone would dwarf the size of the potential recovery.

Washington courts in other settings have reasoned similarly:

[C]ourts look to disparity of relief [between the first and second actions] to determine whether sufficient incentive existed for the concerned party to litigate vigorously. Courts have reasoned that, if the amount a party can recover in an administrative proceeding is insignificant, the party is not likely to have litigated the crucial issues vigorously and it would be unfair to employ collateral estoppel against that party in future proceedings to prevent the relitigation of those same issues in another forum.

*Reninger v. State Dept. of Corrections*, 134 Wash.2d 437, 453, 951 P.2d 782, 790 (Wash. 1998). There was too little at stake in Mr. Weaver’s 2011

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termination of a disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final. . . readjust the rate of compensation[.]”)

claim to justify the effort one might put forth in a pension or permanent injury or death claim. Mr. Weaver missed only a few weeks from work. His recovery would be limited to temporary total disability benefits—pay for a few lost weeks away from work before returning. RCW 51.32.090.

In stark contrast to the small amount of the benefits Mr. Weaver might have obtained if he had prevailed in his 2011 TTD claim, the amount at stake in the present claim is significant indeed. Mr. Weaver’s career as a firefighter ended with his brain cancer surgery in January 2014. He is no longer able to work because of his condition. More likely than not, the cancer in his brain will ultimately cause his death. CABR 325.

Since his 2011 claim involved only a few thousand dollars---as compared to eligibility for a lifetime of payments to Mr. Weaver’s widow---Mr. Weaver did not have “interests at stake that would call for a full litigational effort.” *Hadley*, 144 Wn.2d at 312. Though his lawyer’s tardiness and lack of preparation does not impress, perhaps such low level efforts are easier to understand in the setting where only a minor potential recovery is in play. There certainly was not “sufficient motivation for a full and vigorous litigation of the issue” present. *Id.* at 315.

A judicial efficiency doctrine, like collateral estoppel, should necessarily have limited application, which is why the doctrine is limited to use where it does not produce ‘unjust’ results. Collateral estoppel must not be applied mechanically and rigidly, “and must be qualified or rejected

when its application would contravene an overriding public policy.” *Dana’s Housekeeping, Inc. v. Dept. of Labor and Industries*, 76 Wash.App. 600, 612, 886 P.2d 1147, 1154 (Wash. Ct. App. 1995). Collateral estoppel cannot preclude “relitigation of an important issue of law[,]” or “important question[s] of law.” *Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wash.2d 413, 419, 780 P.2d 1282, 1285 (Wash. 1989) (Collateral estoppel does not apply where the previous action involved an important question of free speech, a personal right, that was not appealed by the previous shopping center owner.); *Kennedy v. City of Seattle*, 94 Wash.2d 376, 378 617 P.2d 713, 715 (Wash. 1980) (Collateral estoppel does not bar the relitigation of the constitutionality of a houseboat ordinance because it would be unjust to others to allow the constitutionality of the ordinance to be determined by an unappealed municipal court ruling.).<sup>2</sup> While employer argues that any future claim could have been favorably treated as an ‘aggravation’ of the initial scapular claim, that is not the appropriate analysis here, nor should Department rules and policies trump the need for limited application of claim preclusion principles when claims involve diseases of entirely distinct manifestations and pathologies.

Our Supreme Court has previously overruled a department practice of lumping subsequent diseases as aggravations of an initial disease when

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<sup>2</sup> See Restatement of Law – Judgments §28(5)(a)-(b) (Am. Law. Inst. 1982) (A party is not precluded when “there is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest . . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action”).

the later disease has distinct and separate characteristics. In *Kilpatrick v. Department of Labor & Indus.*, 125 Wash.2d 222, 229, 883 P.2d 1370 (1994) the Department determined that a later manifesting asbestos-related disease is “an aggravation of the original asbestos-related condition,” though the later disease was found to be unique and different by the Court:

[However,] the problem with treating a separately occurring asbestos-related disease as an aggravation of the original asbestos-related disease is readily apparent. Each asbestos-related disease involves a unique pathology, requires a different treatment, and is not, in fact, an aggravation or continuation of a different asbestos-related condition.

*Id.* at 230. Because asbestos-related diseases manifest in drastically different ways the Supreme Court held that the surviving spouse benefits were to be calculated at the “manifestation of the specific asbestos-related disease that caused the death of the spouse,” as opposed to calculations based upon the manifestation date of an earlier, and more modest, disease process. *Id.*

The only similarity between Mr. Weaver’s metastatic brain cancer and the scapular lesion he had earlier is a similar cell type. Nothing—the treatment, the gravity, the systemic effects, or the likely outcome—of these two disease processes is the same. Mr. Weaver’s brain cancer required a specialized and unique course of treatment that was entirely separate and distinct from any treatment he received for the melanoma on his back. CABR 319-323. When Mr. Weaver’s skin lesion was removed he received no chemotherapy, radiation, or other treatment to aid his recovery. CABR

138. By contrast his brain cancer has required multiple surgeries, radiation treatment, and immune drug therapy, all in an attempt to avoid the terminal outcome described by Dr. Aboulafia. CABR 319-323. And, in contrast to his speedy return to work after his scapular excision, Mr. Weaver is never again going to work. Even prior to his death, Mr. Weaver has been altered by his brain disease, which has left him with permanent cognitive deficiencies. CABR 325.

c. **Nor Does *Res Judicata* Bar Mr. Weaver’s Present Claim**

i. **The prior and the present claim do *not* involve the same subject matter or the same cause of action.**

*Res judicata* does not bar claims arising out of different causes of action. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 865, 93 P.3d 108, 114 (2004). A claim for five weeks of modest benefits is simply not the same “subject matter” as a claim for total, permanent, disability benefits (or, ultimately, benefits paid after death of the worker). No Washington court has squarely addressed this issue in the worker’s compensation setting.

But the Supreme Court of Delaware has. In *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000), the court addressed the ‘same cause of action’ element of *res judicata*, and held that a claim for temporary benefits---and a later claim for permanent benefits---were *not* the same cause of action and thus the result in one claim did not control the result in the other. The claimant injured his knee while at work and was granted

temporary total compensation for five days of work and related medical expenses. *Id.* at 533. However, when claimant returned to seek benefits for ten percent permanent impairment to his knee, the Board rejected claimant's petition and found the impairment was a result of a degenerative joint disease rather than causally related to his work environment. *Id.*

The claimant argued that the Board was precluded from revisiting the favorable causation determination in the petition for permanent partial disability because it was the same cause of action. *Id.* However, the Supreme Court of Delaware disagreed.

Here, the Board initially determined in its 1997 decision that Betts' temporary total disability was caused by the 1995 accident. This conclusion cannot be subsequently revisited pursuant to the doctrine of *res judicata*. In 1999, the Board found that Betts was permanently partially disabled but concluded that the 1995 accident was not the cause of Betts' permanent condition. It is clear that the Board was presented with different claims at each hearing: a claim for temporary total disability and thereafter a claim for permanent partial disability. Because the Board was confronted with a different claim at each hearing it was not barred by the doctrine of *res judicata* from making a determination of causation as it pertained to Betts' Petition for Permanent Partial Disability. Therefore, we conclude that the doctrine of *res judicata* is inapplicable to the facts of this case.

*Id.* at 535. (emphasis added; italics in original).

Furthermore, while *res judicata* may, in appropriate cases, bar the later assertion of claims that could have been but were not asserted in the prior action, it does not bar claims that simply could not have been made at the time of the first proceeding. As a leading commentator has observed,

“If the claim had not fully ripened so that complete recovery was not possible in the first action, a second proceeding may be permitted.” Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985). Here, it would have been impossible for Mr. Weaver to make a claim for pension or death benefits in 2011 because he was not permanently disabled until 2014. Because Mr. Weaver could not have asserted that claim in the prior action, *res judicata* does not apply. Mr. Weaver’s claim for permanent benefits did not ripen until January of 2014, two and a half years after he filed his claim for temporary benefits, more than a year after the hearing on his TTD claim, and one month after he dismissed his appeal of the Board’s decision on that claim.

Where the prior and the present action affect different rights, the causes of action are not the same and *res judicata* does not apply. *Alishio v. Dept. of Social & Health Services*, 122 Wash.App. 1, 8, 91 P.3d 893 (2004). *Alishio* determined that a dependency proceeding and an administrative hearing on the Department of Social and Health Services’s investigative findings regarding child neglect do not affect the same parental rights. *Id.* On an abstract level, “the dependency and administrative proceedings generally share the purpose of securing the rights of parents and children.” *Id.* However, the court held that on a more concrete level the two proceedings were distinct and affected the plaintiff’s parental rights in different ways. *Id.* The dependency proceeding affected the plaintiff’s right

to “rear her son without State intervention.” Id. The administrative hearing, however, had no bearing on her ability to raise her son, and instead might ultimately [only] be used to determine Alishio’s suitability to work or volunteer with children[.]” Id.

Similarly, Mr. Weaver’s prior claim affected one and only one right: the right to five weeks of temporary payments. Mr. Weaver’s present claim affects his right to receive permanent disability benefits until he dies, and affects his family’s receipt of pension benefits after his death. Not only are these claims for two separate types of benefits: it was impossible to assert a claim for permanent benefits before Mr. Weaver’s terminal cancer manifested.

The City argues that if Mr. Weaver is allowed to pursue the present action, the City’s rights or interests established in the prior action would be destroyed. But in the present action, Mr. Weaver does not seek the five weeks of TTD benefits that he would have received if he had prevailed in the prior action. No matter what happens in the present action, the City will not be forced to pay Mr. Weaver for the five weeks of work he missed in 2011.

ii. **Application of *res judicata* in this situation would be inequitable**

*Res judicata* should not be mechanically applied where to do so would “ignore principles of right and justice, and the court should be hesitant to so apply the doctrine as to deprive any person of property rights

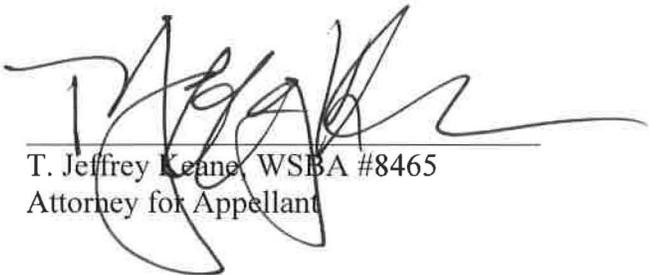
without having his day in court.” *Luisi Truck Lines, Inc. v. Wash. Utilities & Transp. Comm’n*, 72 Wn.2d 887, 435 P.2d 654 (1967). Application of the doctrine here would bar a permanently disabled man – and the family that will in all likelihood be mourning his death within the next year or two – from pursuing a claim that the conditions of his employment were a cause of his deadly cancer. Given the disparity between the minimal amount at stake in the prior claim for temporary benefits and the present claim for death and pension benefits, application of *res judicata* here would “ignore principles of right and justice.” Moreover, since there was so little incentive to continue litigating the small claim for a few weeks of temporary benefits through every possible level of appeal, precluding Mr. Weaver from litigating the far more significant present claim would unjust on its face. Equitable principles should not serve such a purpose.

#### V. CONCLUSION

In light of the foregoing, Mr. Weaver requests that this Court overturn the trial court and the BIIA, and return the case for administrative and hearing processes which Mr. Weaver was denied.

Dated this 6<sup>th</sup> day of July, 2017.

KEANE LAW OFFICES



T. Jeffrey Keane, WSBA #8465  
Attorney for Appellant

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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MICHAEL WEAVER, )  
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 Appellant, )  
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 vs. )  
 )  
 CITY OF EVERETT, DEPARTMENT OF )  
 LABOR AND INDUSTRIES, )  
 )  
 Respondents. )

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No. **76324-5-I**  
**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of Appellant’s Brief was served on the following via email:

Gary D. Keehn  
Keehn Kunkler  
810 Third Avenue, Suite 730  
Seattle, WA 98104  
gkeehn@keehnkunkler.com

Alexander Jouravlev  
Assistant Attorney General  
7141 Cleanwater Lane SW  
PO Box 40121  
Olympia, WA 98504  
alexanderj@atg.wa.gov

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 6<sup>TH</sup> day of July, 2017.

/s/ Donna M. Pucel  
Donna M. Pucel

# KEANE LAW OFFICES

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