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Court of Appeals
Division I
State of Washington
NO. 76324-5-1

No. 96189-1

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

MICHAEL WEAVER

Appellant

v.

CITY OF EVERETT, DEPARTMENT OF
LABOR AND INDUSTRIES

Respondent

**REPLY BRIEF OF APPELLANT TO BRIEF
OF RESPONDENT, DEPARTMENT OF LABOR
AND INDUSTRIES**

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I. INTRODUCTION

The State argues that nothing is wrong, that procedures long in place govern the outcome here, and that any result other than denial of the present appeal would itself violate the law. Yet the simple legal and procedural truth is that claim preclusion principles expressly give way to injustice and unfairness. Every case discussing those principles says so and every commentator conditions their application upon both utility *and* fairness. Not a word in the State's brief addresses the plain unfairness of governing an economic 'life and death' claim by the outcome in what was, in the Labor & Industries world at least, a decision equivalent to that in a traffic infraction hearing.

The State makes much of the size of the original sheet of skin removed from Mr. Weaver, which establishes nothing. There is no dispute that following his modest surgery and a short recovery period Mr. Weaver believed he was 'cured' and he returned to his usual work.

Nothing in the record supports the State's argument that Mr. Weaver knew (or was even told) he was participating in an initial 'claim allowance' proceeding the outcome of which would govern any subsequent proceeding

if his unchallenged optimism about his medical treatment proved unsound and his disease returned.¹

The trial court omitted any consideration of justice or equity in ruling that collateral estoppel bars the current claim:

“[I]t is this Court’s decision that the issues before this Court are the same issues outlined by the BIIA in its Final Decision and Order dated January 15, 2016. Petitioner cannot now in this action collaterally attack the BIIA Decision Final (sic) Order dated February 13, 2013.”

Trial Court Decision on Administrative Appeal, p. 8.

The State endorses that reasoning and even suggests that applying issue preclusion here ‘gives dignity and respect to judicial proceedings.’ Respondent’s Brief at p. 35; *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). In the face of un rebutted evidence that counsel for Mr. Weaver barely showed up for hearing, prepared no witnesses and---in the setting of a case where occupational sun exposure was the main issue, hardly mentioned it---one wonders what ‘dignity’ it brings to rely upon that performance to support perpetual foreclosure of a fatal occupational disease claim.

¹ The State argues, without support, that all understood a final decision in the initial minor matter was a final decision ever more: “After the previous case, all understood there was a final determination that Weaver’s occupation did not cause his melanoma.” Brief of Respondent Labor & Industries, p. 35. Nothing in the record supports this claim. Mr. Weaver most certainly understood no such thing.

Ultimately, despite the length and breadth of the State's response, the issue here devolves to this: in every claim allowance proceeding in Washington State, is an adjudication in favor of the employer a final, forever, and irreversible adjudication of that person's workmen's compensation rights, however trivial the first injury and however dire the last one?

And, in answering that question should the courts give any credence to the fairness and equity principles oft mentioned when applying issue preclusion? As our Supreme Court has stated, when applying *res judicata* do not "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. Commission*, 72 Wn.2d 887, 896, 435 P.2d 654, 660 (1967).

II. ARGUMENT

A. This Case Arises from a Statutory Scheme Interpreted to Favor Workers

The grand bargain entered into over 100 years ago between workers and employers was never intended as a game of 'gotcha,' where words unspoken govern and procedural tools to frustrate the workers' path to recovery were utilized.

As recently as this year the Washington Supreme Court reminded all of the purpose of the Industrial Insurance Act:

This court has consistently held that because the IIA “is remedial in nature,” it must 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*, 109 Wash.2d at 470, 745 P.2d 1295. “With this principle in mind,” *id.*, both the legislature and this court have expanded occupational disease coverage under the IIA. The trend toward liberal coverage supports Street’s argument that a worker need not present expert medical testimony to prove an occupational disease “arises naturally” from employment.

Street v. Weyerhaeuser Company, 189 Wn.2d 187, 195, 399 P.3d 1156 (2017).

The State understandably overlooks the harsh result with which Mr. Weaver has been left and instead contends that ‘claim allowance’ is a one time proceeding, no matter the future course of a workmen’s compensation claim. Thus, it argues, the outcome here should not be disturbed. This overlooks the fact that, particularly in the occupational disease setting, where proof can be complicated and the expense of experts a necessary element of the case, the price of simply participating can dwarf the benefits to be gained. Mr. Weaver’s case presents an example of just that for in his initial claim he sought a few weeks of time loss, plus medical benefits though the latter were available through his employment whether he was covered or not. This was, truly, a minor claim.

The low level expert called to support Mr. Weaver’s case, and the low level of effort expended in preparation and presentation of his case—while no excuse—at least demonstrate the problem with the ‘one and done’

claim allowance rule the State would use in applying claim preclusion. To on the one hand claim this system is built to favor workers, and on the other to defeat worker claims based on the result in prior low gain and poorly presented claim proceedings is itself a contradiction.

B. *In re Keith Browne* Addresses Propriety of Claim Preclusion Principles

The Board itself has adopted a sliding scale, based upon the foreseeability of the application of the doctrine in a subsequent case at the time of the initial case, in deciding whether to apply the doctrine. 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. Law Rev. 805 (1985).

If that decision and logic mean anything, at minimum whether the potential impact of a bar to Mr. Weaver’s future compensation claims was made known during the first proceeding should be a procedural requirement. Left unsaid by court, and counsel, in that proceeding was that it had any effects at all other than upon the then modest case being prosecuted.

In examining how the first matter was handled, from the absence of work place testimony describing sun exposure at work, to the tardiness of the arrival of counsel for claimant for the hearing itself, to the absence of any preparation of claimant or the other witnesses, to the marginal qualifications of the claimant's expert whose testimony mostly consisted of agreeing with statements read to him---the presentation was clearly deficient. It was obvious that the design of the case was intended for a low stakes and low value claim. Nothing about the case indicated that claimant or his counsel had the 'foreseeability of the significance of that issue in regard to subsequent legal actions' in mind during the hearing.

In short, a poorly conceived, organized and presented case might more easily be excused when it occurred during the claim than in issue. The State neither seeks to rebut nor comment upon the ill preparedness of claimant or the workplace witnesses, says nothing about the misdirection of the testimony offered regarding smoke and chemical exposure, and plainly disregards the harshness to Mr. Weaver of leaving him without remedy if the first result pre-ordains the second.

If the Board meant anything when it decided *Keith Browne*, some assessment of the frailty of proof and misdirection of the evidence submitted should be made before invoking *res judicata*. Not a word in the State's brief is devoted to disregarding the testimony, in the second proceeding, of Dr.

Andrew Brodtkin, one of the most eminent occupational disease/melanoma experts in the United States who testified by affidavit in the second proceeding. And this very expert resides in the same locale as the hearing.

Dr. Brodtkin:

- Practiced internal medicine and is board certified therein.
- Has practiced for 24 years specializing in Occupational and Environmental Medicine, including doing research on the health effects of exposure to toxic substances.
- Served as a Fellow in the prestigious Occupational and Environmental Medicine Department at the University of Washington Medical School.
- Has taught for years in the field of Occupational and Environmental Medicine at the University of Washington, and was associate director of the University's Occupational and Environmental Medicine Residency/Fellowship Program, serving as its director 2000-2003.
- Was certified by the American Board of Preventative medicine in Occupational Medicine in 1994, and is a Fellow of the American College of Occupational and Environmental Medicine.
- Serves as one of the editors of the leading text in the field, the *Textbook of Clinical Occupational and Environmental Medicine*, 2nd Edition. Dr. Brodtkin edited chapters in the text relating to skin cancer, including melanoma, as well as the occupational health of firefighters.

Dr. Brodtkin did a rigorous literature review, conducted a careful review of the co-worker evidence developed during Mr. Weaver's second claim, corroborated that evidence with his interview of Mr. Weaver, and concluded:

16. Based on my experience, education, training, and research, as well as the evidence presented in Paragraphs 9-15, above, it is my opinion, to a reasonable degree of medical certainty and on a "more

probable than not basis,” 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. It is also my opinion to a reasonable degree of medical certainty, and on a “more probable than not basis,” 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. (underlining in original).

CP 144-145.

To be sure, the expense of simply hiring Dr. Brodtkin likely exceeds the entire economic value which would have been obtained by a result in the initial hearing which favored Mr. Weaver. It makes little economic sense to *not* call such a high level expert if one ‘recognizes’ the ‘foreseeability’ of applying the outcome in case one to any subsequent case.

Put bluntly, are the courts simply to ignore the obviousness of the poverty of proof and preparation in what was perceived to be a low stakes allowance proceeding? Is claim preclusion and ‘one time only allowance’ policy of such importance that they mandate the outcome Mr. Weaver has obtained to date in the present matter?

C. Utilizing Claim Preclusion Principles Without Regard for the Application of Equity Ignores the Law

The Supreme Court’s *Kingery* decision, encompassing three opinions of various justices, concerned whether the use of *res judicata*

should be tempered by the application of equity.² Judge Dean Morgan, in a scholarly analysis of what the court actually decided, concluded the following:

To read the three opinions together is to see that five or more justices subscribed to three propositions. First, equitable relief from *res judicata* is *not* limited to circumstances in which the claimant was incompetent or illiterate; CR 60 and/or “the court’s equitable powers” permit the court to grant relief under other circumstances also. Second, as one condition of equitable relief, the claimant must have diligently pursued his or her rights. Third, Kingery had not diligently pursued her rights. (emphasis in original)

Department of Labor and Industries of the State of Washington v. Fields Corporation, 112 Wash.App. 450, 459, 45 P.3d 1121 (2002).

Judge Morgan further noted: “In the Supreme Court’s opinions in *Kingery*, however, all nine justices seem to have indicated that at least in worker’s compensation cases, a court can use its “equity power” to relieve a party from the effects of *res judicata*. As a result, the Department’s acknowledgement (of same) seems well founded. *Fields*, 112 Wash. App. 450, fn. 18.

Thus, applying *Kingery* here, the trial court was not compelled—as it appeared to feel—to adopt the decisions of the department and the Board, and deny Mr. Weaver relief. Unfortunately, the trial court said and did nothing to suggest it conducted an equitable evaluation. As the decision

² *Kingery v. Department of Labor and Industries of the State of Washington*, 132 Wn.2d 162, 937 P.2d 565 (1997).

made clear, there was nothing before the trial court that mattered other than the claimed ‘importance’ of claim finality. The trial court’s decision reads as tautology:

[T]he doctrine of collateral estoppel was properly applied in the second action, due to the importance of claim allowance or a determination that the melanoma (the same melanoma which is the subject of this appeal) was an industrial illness in the initial action for a permanent temporary disability (sic). It was the initial action which was determinative as to whether the claimant was entitled to any benefits whatsoever under the industrial insurance act. RCW 51.32.190; RCW 51.32.160.

Trial Court’s Opinion/Order, p. 7. The court did nothing other than parrot the employer, and the State’s, insistence that it had only a single path and that was rejection of the claim.

D. Persuasive Analogous Authority from Other Jurisdictions

Lastly, the State labors to criticize claimant’s use of a case from Colorado (*Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001)) cautioning that Washington does not look to the workmen’s compensation schemes of other states which are likely not identical to Washington’s. The actual purpose of discussing *Sunny Acres*, and *Betts v. Townsends*, 765 A.2d 531, 535 (Del. 2000) is to illustrate how other courts have addressed what lies at the heart of the present case: is it equitable, and consistent with the equitable principles underlying claim preclusion doctrines, to expect the

same 'litigational effort' in separate legal proceedings where the consequences differ as vastly as any two outcomes possibly could?

Other courts have answered that it is not equitable and not congruent with claim preclusion law to so decide. That reasoning, and that argument, underlies every contention made in the present case.

III. CONCLUSION

Through no fault of his, Mr. Weaver was victimized by the Labor & Industries system, not advantaged by it. As is beyond clear from the record of the underlying proceeding, the presentation was a sham, the preparation non-existent, the testimony off the mark and often irrelevant to the very issues before the court.

If it is the law of this State that the outcome that presentation wrought may control a far more important and far more valuable proceeding later brought, this Court should so state. And in doing so, it should reconcile the demand that 'equity' be present with the result delivered to a deserving, and blameless, claimant.

Submitted this 31st day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below a copy of the Reply

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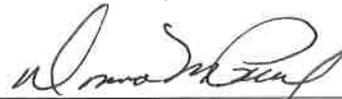
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 31st day of October, 2017.



Donna M. Pucel

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