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State of Washington

No. 96189-1

NO. 76324-5-I

**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

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I. INTRODUCTION

Judicial efficiency doctrines have been inappropriately used to deny appellant a proper opportunity to contest denial of his occupational disease claim for terminal cancer. Such doctrines are generally applied to prevent serial re-litigation of the same dispute, or the same issue. But their use is always backstopped by avoiding their use when it would be unjust to allow their use. This case presents as inequitable an application of the doctrines as one could imagine.

Barring Mr. Weaver from a recovery based upon the outcome of a prior, trivial, L & I claim is to ignore the foundation upon which claim preclusion principles rest. The record shows casual -- even cavalier -- handling of Mr. Weaver's initial melanoma claim by his prior counsel. His counsel did not prepare Mr. Weaver for the hearing, did scant development of co worker testimony regarding sunburns at work, and even tardily arrived at the hearing itself. These behaviors do not speak well of the adequacy of this representation. To pile upon that a resulting bar to a serious occupational health claim is to give employers a windfall, and give injured workers no faith that equitably based doctrines truly produce equitable outcomes.

Nothing in the record of the first L & I proceeding indicates that Mr. Weaver knew, or was ever told, that his melanoma might return in a

different and deadly form. Indeed, he obviously thought otherwise since he quickly treated and immediately returned to work. Nor did anything in the denial of the initial claim from the Department telegraph that any future claim would be barred based upon the outcome in the initial claim.

II. ARGUMENT AND AUTHORITY

A. The Judicially Created Doctrines of Collateral Estoppel and *Res Judicata* Do Not Bar Mr. Weaver's Present Claim for Permanent Total Disability Benefits

1. The use of the equitable doctrine of collateral estoppel to bar Mr. Weaver's present claim will work an extreme injustice against him and his family

For over one hundred years, workers in Washington have enjoyed the protection of the Industrial Insurance Act, which "was the result of a compromise between employers and workers." *Dennis v. Dept. of Labor and Indus.*, 109 Wash.2d 467, 469, 745 P.2d 1295, 1297 (1987); *See Stertz v. Industrial Ins. Com'n of Washington*, 91 Wash. 588, 158 P. 256 (1916) (explaining the historical beginning of the Industrial Insurance Act as a compromise between employers and employees to reduce litigation.). The Act is designed to ease the claim path workers with job related injuries and disease must follow when their work hurts them.

To further that goal, Washington courts have "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.'" *Street v. Weyerhaeuser Co.*, 2017 WL 3428958 *4 (2017) (citing *Dennis v. Dept. of Labor and Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295, 1297 (1987)).

Though the doctrine of collateral estoppel has a certain allure when it prevents the improper use of the courts, unfortunately "[C]ourts will too readily turn to the rules of *res judicata* and collateral estoppel." Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 842 (1985). Claim and issue preclusion principles are judge-created efficiency doctrines sometimes used to redress misuse of the court system. But none concerned should forget the ultimate and "final objective" of our judicial system when using these efficiency doctrines – "doing justice." *Id.*

Because collateral estoppel is a judicially created doctrine, it 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 Indust.*, 76 Wash. App. 600, 612, 886 P.2d 1147, 1154 (1995). And where the matter is of importance -- as here where the very ability of an injured worker to seek workmen's compensation benefits is impeded -- Washington courts have held that

collateral estoppel should not 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 (1989) (Collateral estoppel does not apply where the previous action involved resolution of an important question of free speech, a personal right, that holding was not appealed by the previous shopping center owner.); *Kennedy v. City of Seattle*, 94 Wash.2d 376, 378, 617 P.2d 713, 715 (1980) (Collateral estoppel does not bar 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.).

The Board of Industrial Insurance Appeals ruled that 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). This important teaching reminds that the *legal* effect of the first action as to all future actions be foreseeable at the time of the first proceeding. It requires that the party against whom collateral estoppel is to be later applied be

aware during the first proceeding of such peril. Yet here there is no evidence to suggest that Mr. Weaver had any reason to believe that if he lost the first claim on the ground that his melanoma was not caused by his employment, he would be precluded from seeking a recovery when that melanoma later metastasized and threatened his life.

Respondent states that *Sunny Acres Villa Inc. v. Cooper* does not have any precedential effect here. Response brief, p. 22. Strictly speaking that is correct. Yet since Washington courts have yet to decide exactly what constitutes an adequate incentive for a 'full litigational effort' in the context of workers' compensation claims, authority from the highest court of another state is offered for its persuasive, not its precedential, value. The Court in *Sunny Acres* considered the exact issue present here under a similar statutory scheme. The decision, and the reasons for it, warrant consideration.

2. Application of *res judicata* to the present claim is inequitable because Mr. Weaver could not have foreseen the cancer metastasizing in such a debilitating fashion

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 Wash.2d 887, 896, 435 P.2d 654, 660 (1967). *Res*

judicata cannot "defeat the ends of justice, or to work an injustice." *Id.* (citing *DiCarlo v. Angeloni*, 3 Cal.2d 225, 235, 44 P.2d 562, 567 (1935) (explaining the generally recognized principle that *res judicata* cannot be applied if it would "defeat the ends of justice.")). A leading commentator on the matter agrees: "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, 827 (1985).

The Industrial Insurance Act "must be liberally construed in order to achieve its purpose of providing compensation to all covered employees." *Street v. Weyerhaeuser*, 2017 WL 3428959 *4 (2017). The court and legislature over time "have expanded occupational disease coverage under the IIA." *Id.* This confirms the liberal protections of the Act, and recognition of its broader application in the modern world where workers suffer not only broken bones but cancers too, caused by their work. It is unjust to mechanically apply the doctrine of *res judicata* in the worker's compensation setting without examining the justice, or injustice, of its particular application.

The Board itself has agreed that "an order of the Department will not be held to have a *res judicata* effect unless it specifically apprises the parties of the determinations being made." *In Re Keith Browne*, BIIA Dec.,

06 13972 (2007). Though nothing in the prior order "specifically apprised" Mr. Weaver of any downstream effects, Respondent argues that the determination in the prior action is "neither inconsistent nor ambiguous." Response brief, p. 32. But, there is nothing in the Department's order denying Mr. Weaver's prior claim which informed him the same order would deprive him of all *future* benefits if his cancer metastasized. CABR 278. If *res judicata* is to be applied in cases like this, where there is a large chasm between the potential benefits in a temporary total disability claim and those in a permanent total disability claim, the order of the Department and the Board should clearly so state.

B. Under Washington's Industrial Insurance Act, Filing for an Aggravation Does not Produce Automatic Benefits Because Employers and the Department can Still Contest and/or Deny an Aggravation Claim, Forcing Applicants to Relitigate Causation

Respondents argue that if Mr. Weaver's initial melanoma was occupationally caused, he could have filed a later aggravation application and permanent benefits would automatically thereafter flow to him. This ignores the high motivation employers have to contest claims where significant monetary sums---such as those awardable in a total permanent disability claim—are in issue. Response brief, p. 16. However, under RCW 51.32.160 no such "automatic" award of benefits occurs. There is no

evidence here that Mr. Weaver would have had an automatic 'win' upon filing an aggravation application had he prevailed in his first proceeding.

> " . . . RCW 51.32.160(1)(a) allows a claim to be reopened for aggravation of a condition proximately caused by an industrial injury or of an occupationally-related condition. Workers seeking to reopen their claims under this provision must establish the following elements: (1) causal relationship between injury and the subsequent disability must be established by through medical testimony, (2) the claimant must prove by medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability, (3) The medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation period, and (4) a claimant must prove by medical testimony, some of it based upon objective symptoms which existed on or prior to the closing date, that his disability on the date of the closing order was greater than the supervisor found it to be."

Eastwood v. Dept. of Labor and Industries, 152 Wash. App. 652, 657-58, 219 P.3d 711, 713-14 (2009). Employers and the Department often challenge whether a claimed aggravation is truly the same injury or disease. *See Orozco v. Dept. of Labor and Industries*, 196 Wash. App. 1006, 2016 WL 5342585 (2016) (holding employee's injury did not cause his current mental health conditions); *Matto v. Haggen, Inc.*, 193 Wash. App. 1026, 2016 WL 1566824 (2016) (affirming the overturning the Department's denial of respondent's aggravation claim, despite the employer's urging to deny employee's claim.); *McElwaney v. Dept. of Labor and Industries*, 157 Wash. App. 1063 (2010) (holding that employee failed to establish

aggravation of occupational disease because no medical testimony indicated worsening of the occupational disease.); *Eastwood v. Dept. of Labor and Industries*, 152 Wash. App. 652, 657-58, 219 P.3d 711, 713-14 (2009) (holding that because employee did not provide objective medical evidence of worsening the lower court erred in finding an aggravation of her occupational disease.).

Finally, respondents argue that allowing Mr. Weaver to succeed here would destroy the Employer's interests in a "final and binding determination[.]" Response brief, p. 32. To the extent the result employer here seeks would be an unjust or inequitable one, claim preclusion principles should not be used to support such outcomes. As *Sunny Acres* shows, not only injured workers but employers, too, are protected from unjust results by the proper application of *res judicata* and collateral estoppel.

When the consequences are modest and the incentive to pursue (or defend) a claim is accordingly compromised, both workers and employers are protected by a system which does not give rote preclusive effect any time or every time a prior claim or defense has involved similar subject matter.

III. CONCLUSION

Mr. Weaver asks that the Court reverse the judgment of the superior court and remand the matter to the Department level for adjudicative fact finding regarding whether Mr. Weaver's present metastatic melanoma was caused by his work exposures.

Dated this 6th day of September, 2017.

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I hereby certify that on the date set forth below a copy of Plaintiff's Designation of Clerk's Papers was served as follows:

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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 6th day of September, 2017.

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