

No. 96189-1

NO. 76324-5-I

COURT OF APPEALS
DIVISION I
IN THE STATE OF WASHINGTON

MICHAEL WEAVER,

Appellant/Plaintiff,

v.

THE CITY OF EVERETT,

Respondent/Defendant.

BRIEF OF RESPONDENT

Gary Keehn, WSBA #7923
KEEHN KUNKLER, PLLC
810 Third Avenue
Suite 730
Seattle, WA 98104
(206) 903-0633

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I. INTRODUCTION

The employer, the City of Everett, offers the following as an introductory comment and summary of the employer's position. In 2011 claimant, Michael Weaver, signed an application for industrial insurance benefits with the City of Everett for malignant melanoma. The claim was assigned SG-15654 (prior action). There was a final judgment on the merits which determined claimant's cancer was not an occupational disease as it did not arise naturally and proximately out of the distinctive conditions of his employment with the City of Everett Fire Department.

Claimant's malignant melanoma metastasized to his brain. On July 18, 2014, claimant then signed a second application for industrial insurance benefits with the City of Everett for the metastatic brain cancer. The claim was assigned SH-28667 (present action). The Department of Labor and Industries issued an order denying the claim. Claimant appealed to the Board of Industrial Insurance Appeals.

The employer filed a motion for summary judgment on the basis of collateral estoppel and res judicata. The motion for summary judgment was granted. Claimant appealed the determination to the Superior Court.

The Superior Court affirmed the order of the Board. Claimant appealed to the Court of Appeals.

Claimant mistakenly argues collateral estoppel and res judicata principles should not be applied because the present and prior actions are not the same because all that was involved in the prior action was temporary total disability benefits and the present action involves pension benefits (total permanent disability). It is the employer's position the present and prior actions involved claimant's right to receive benefits under the Industrial Insurance Act for his malignant melanoma. The elements of res judicata and collateral estoppel were met and summary judgment was properly granted by the Superior Court.

II. STATEMENT OF THE CASE

Claimant is a fair-skinned Caucasian man with blue eyes and blonde hair. CP 11 at 264. He spent a majority of his youth in north Texas. CP 11 at 264. He suffered at least one serious sunburn as a youth. CP 11 at 264. Claimant required cold wet towels for treatment of sunburns repeatedly as a child in Texas. CP 11 at 305. After he graduated from high school, he joined the military and spent three years as an outdoor guide in the Bob Marshall and Sawtooth Wilderness areas. CP 11 at 264.

Claimant was diagnosed with malignant melanoma, which was treated surgically by Dr. Byrd on July 6, 2011. CP 11 at 285, 298. Dr. Byrd removed 16 square inches of tissue from claimant's back and took a lymph biopsy of his left armpit of two lymphoids. CP 7 at 73. Claimant was referred to Dr. David Aboulaflia, a specialist in medical oncology, for further evaluation and treatment in February 2012. CP 7 at 126.

In 2011, claimant signed an application for industrial insurance benefits with the City of Everett for malignant melanoma. CP 11 at 246. The claim was assigned SG-15654 (the prior action). CP 11 at 246. Dr. Hackett, who is board certified in internal medicine and dermatology, performed an independent medical examination under the prior action on November 28, 2011. CP 11 at 295. Dr. Hackett's diagnosed malignant melanoma and he opined this diagnosis was not related to claimant's employment as a firefighter for the City of Everett. CP 11 at 296. Dr. Aboulaflia has opined malignant melanoma is classically a cutaneous or skin cancer that has a proclivity to spread rapidly. CP 7 at 124. Dr. Levenson, who is board certified in medical oncology and hematology, also performed an independent medical examination under the prior action on November 28, 2011. CP 11 at 282. Dr. Levenson's diagnoses included melanoma, Clarks' level four, Breslow thickness 2.0 millimeters,

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KEEHN KUNKLER, PLLC
810 Third Avenue, Suite 730
Seattle, WA 98104
Tel: (206) 903-0633
Fax: (206) 625-6958

superficial spreading variety, with negative sentinel node. CP 11 at 283. Dr. Levenson opined this diagnosis was not related to claimant's employment as a firefighter for the City of Everett. CP 11 at 283. Both Dr. Hackett and Dr. Levenson were of the opinion claimant's melanoma would have occurred irrespective of his firefighting activities and claimant's occupational exposure as a firefighter did not cause, aggravate or accelerate the malignant melanoma. CP 11 at 293, 306.

Claimant's first visit with Dr. Aboulaflia was on February 9, 2012. CP 7 at 125. Dr. Aboulaflia's impression was claimant had "a fairly significant cancer diagnosis that could affect his longevity." CP 7 at 127.

On January 3, 2012, the Department of Labor and Industries issued an order denying the application for benefits under the prior action because the condition was not an occupational disease. CP 11 at 251, 278. Claimant filed an appeal with the Board of Industrial Insurance Appeals. CP 11 at 251. The appeal was granted and assigned Docket No. 12 11709. CP 11 at 251. The parties stipulated to the jurisdictional history on or about April 5, 2012. CP 11 at 252. Board hearings were held before Judge Dannen on September 11, 2012 and both sides presented evidence. CP 11 at 247. IAJ Dannen issued a Proposed Decision and Order on January 15, 2013, affirming the Department order. CP 11 at 252 -264.

The Findings of Fact included that claimant'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. CP 11 at 264. Claimant filed a Petition for Review. CP 11 at 247. The Board denied the Petition for Review on February 11, 2013 and the Proposed Decision and Order became the final Decision and Order of the Board. CP 11 at 265. Claimant, pro se, filed an appeal from the February 11, 2013 Decision and Order in the Snohomish County Superior Court. CP 11 at 247. On October 15, 2013, the employer filed a motion to dismiss claimant's appeal because claimant failed to perfect the appeal. CP 7 at 122. On November 12, 2013, claimant signed a Stipulation and Agreed Order of Dismissal. CP 7 at 122. On December 11, 2013, the Snohomish County Superior Court signed and granted the Stipulation and Agreed Order of Dismissal, which dismissed claimant's appeal with prejudice. CP 11 at 248.

In January 2014, claimant started complaining about his cognitive abilities and he was evaluated by Dr. Aboulafia. CP 7 at 128. Claimant had a cerebral mass, seen on an MRI dated January 7, 2014. CP 11 at 284. 297. On January 9, 2014, Dr. Charles Nussbaum performed a left frontal craniotomy CP 11 at 284. 297. The surgical pathology report confirmed

the diagnosis that claimant had recurrent and metastatic melanoma involving the brain. CP 7 at 129. Postoperatively, a brain MRI scan revealed two satellite brain lesions and claimant was treated with radiotherapy and ipilimumab. CP 11 at 284. 297.

On July 18, 2014, claimant signed a second application for industrial insurance benefits with the City of Everett for the metastatic brain cancer. The claim was assigned Claim No. SH-28667 (the present action). CP 11 at 275. Debby Parker, supervisor of Comprehensive Risk Management forwarded additional records to Dr. Hackett and Dr. Levenson to investigate the new application for benefits. CP 11 at 275.

Upon review of the additional records, Dr. Hackett opined the recently diagnosed brain lesions were metastases from the original cutaneous melanoma. CP 11 at 297. His rationale was as follows: primary melanoma of the brain is quite rare and mostly seen in Asians. CP 11 at 297. Claimant's initial skin tumor was thick (2mm) thus more prone to metastasis. CP 11 at 297. Finally, his sentinel node, while initially read as negative, was felt to be equivocal upon review at the University of Washington. CP 11 at 297. The two new satellite lesions noted on MRI were also most likely metastases from the original skin lesion. CP 11 at 297. Recurrent metastases to the brain or lung are a typical course for a

thick melanoma. CP 11 at 297. Dr. Levenson also opined the recently diagnosed brain lesions were metastases from the claimant's original high risk melanoma. CP 11 at 284.

On November 12, 2014 the Department denied the claim for benefits because the claim was filed for the same cancer that was previously denied. CP 11 at 281. On January 8, 2015, claimant appealed the November 12, 2014 Department order. CP 11 at 272. The Board granted the appeal on January 22, 2015 and assigned it Docket No. 15 10293. CP 11 at 272. On February 24, 2015, the parties stipulated to the jurisdictional history. CP 11 at 271.

Dr. Hackett and Dr. Levenson reviewed additional medical records in August 2015. CP 11 at 284, 297. These records were from the Virginia Mason Medical Center and outlined treatment and evaluation of claimant's medical condition from January 2014 through March 2015 including records from Dr. Aboulafia, claimant's treating oncologist. CP 11 at 284, 297.

After review of these additional records, Dr. Hackett and Dr. Levenson both agreed claimant's brain cancer and satellite lesions were metastases from claimant's original high risk melanoma, treated surgically by Dr. Byrd on July 6, 2011. CP 11 at 285, 298. In other words, Dr.

Levenson and Dr. Hackett opined claimant's brain cancer and satellite lesions are a metastatic cancer, not a new primary cancer, and are the same cancer (malignant melanoma) that was the subject matter of the previous litigation under Docket No. 12 11709.

On August 20, 2015, the Employer filed a Motion for Summary Judgment. CP 11 at 228-309. The employer argued claimant was barred by the doctrine of res judicata and collateral estoppel from litigating the present action. On October 19, 2015, claimant filed a Memorandum in Opposition to the Employer's Motion for Summary Judgment. CP 7 at 170-202. Claimant subsequently filed a Declaration of Dr. Brodtkin in opposition to the Employer's Motion for Summary Judgment. CP 7 at 134-166. He then filed a Declaration of Dr. Aboulafia in opposition to the Employer's Motion for Summary Judgment. CP 7 at 108-109. On November 5, 2015, the Employer filed a Reply to Claimant's Opposition to the Employer's Motion for Summary Judgment. CP 7 at 110-134.

A summary judgment hearing was held on November 9, 2015. On December 7, 2015, IAJ Booker-Hay issued a Proposed Decision and Order granting the Employer's Motion for Summary Judgment under the grounds of collateral estoppel and affirming the Department order dated November 12, 2014. CP 7 at 57-62. Claimant's attorney filed a Petition for

Review from the Proposed Decision and Order. CP 7 at 25-53. The employer filed a reply to claimant's Petition for Review. CP 7 at 5-24. On January 15, 2016, the Board issued an order denying the claimant's Petition for Review, and the Proposed Decision and Order because the final Decision and Order of the Board. CP 7 at 3.

Claimant appealed the January 15, 2016 Decision and Order to the Snohomish County Superior Court on February 12, 2016, and the appeal was assigned 16-2-02373 6. CP 2. The matter came on for a non-jury trial on October 18, 2016 before Judge Thomas Wynne, but the matter was continued. CP 26. On December 5, 2016, argument was held before Judge Wynne. CP 29. On December 15, 2016, Judge Wynne issued a Decision on Administrative Appeal. CP 30. In that decision, Judge Wynne affirmed the January 15, 2016 Decision and Order of the Board of Industrial Insurance Appeals. Claimant filed a notice of appeal to the Court of Appeals. CP 31. On March 29, 2017, Judge Wynne signed an Order and Judgment consistent with his December 15, 2016 Decision on Administrative Appeal. CP 36. Claimant then amended his notice of appeal.

III. ARGUMENT

A. SCOPE OF REVIEW

The Superior Court's jurisdiction over matters arising under the Industrial Insurance Act is limited by the terms of the Act. RCW 51.04.010; RCW 51.52.110 and .115. Original jurisdiction over matters arising under the Industrial Insurance Act resides with the Department of Labor and Industries. *Lenk v. Dep't of Labor & Indus.*, 3 Wn.App. 977, 982, 478 P.2d 761 (1970); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) ("the Act provides that both the Board and the superior court serve a purely appellate function.")

The Superior Court is an appellate court with respect to appeals from the Board and is bound by the same constraints as apply to all appellate courts. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Superior Court review of a Decision and Order of the Board of Industrial Insurance Appeals is de novo on the Certified Appeal Board Record. Review is limited to those issues encompassed by the appeal to the Board, or properly included in its proceedings, and the evidence presented to the Board. RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) ("The trial court is not permitted to receive

evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board.”).

While the court should liberally construe the Industrial Insurance Act in favor of “those who come within its term[s], persons who claim rights thereunder should be held to *strict* proof of their right to receive benefits provided by the act.” (emphasis added). *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (quoting *Olympia Brewing Co. v. Dep’t of Labor & Indus.*, 208 P.2d 1181, 1185, 34 Wn.2d 498, 505, (1949)). The rule of ‘liberal construction’ does not apply to questions of fact. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Nor does the rule dispense with the requirement that the plaintiff must produce competent evidence to prove the facts upon which he or she relies to substantiate eligibility for the benefits sought. *Id.*

B. STANDARD OF REVIEW SUMMARY JUDGMENT

The Court of Appeals reviews summary judgments de novo. *Richert v. Tacoma Power Utility*, 179 Wn.App 694, 702, 319 P.3d 882 (2014). Summary judgment is appropriate when it is determined by “uncontroverted facts. . . that there are, as a matter of fact, no genuine issues.” *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). See also CR 56 (c). The burden is upon the party moving for summary

judgment to show that there is no issue of material fact. A material fact is defined “one upon which the outcome of the litigation depends, in whole or in part.” *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Moreover, “all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion.” *Hash by Hash v. Children’s Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

Our courts have found, “although a party moving for summary judgment has the initial burden of showing there is no dispute as to any issue of material fact, once that burden is met, the burden shifts to the nonmoving party.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). CR 56(e) provides once a motion for summary judgment is made, “an adverse party may not rest upon the mere allegations or denials of a pleading, but a response. . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.” In other words, expressing an opinion or making conclusory statements is insufficient, and the non-moving party “must establish specific and material facts to support each element of his or her prima facie case.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43

(1996). If the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then trial court should grant the motion.” *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass’n*, 809 F. 2d 626, 630-32 (9th Cir. 1987)) The moving party can point out the absence of competent evidence to support a non-moving party’s case. *Fisher v. Aldi Tire, Inc.*, 78 Wn.App. 902, 906, 902 P.2d 166 (1995), *rev. den.*

C. Claimant is barred by the doctrine of res judicata and collateral estoppel from proceeding with litigation of the present action

Claimant is barred by the doctrine of res judicata and collateral estoppel from proceeding with litigation of the present action. The difference between res judicata and collateral estoppel is “the doctrine of res judicata applies to entire claims or causes or action” whereas “the doctrine of collateral estoppel may apply to factual determinations such as those contained within the findings of fact which merely pertain to a single factual issue as opposed to the entire claim.” *In re Keith Browne*, BIIA

Dec., 06 13972 (2007). The doctrine of claim preclusion applies to final judgments by the Department of Labor and Industries and the Board of Industrial Insurance Appeals in the same way claim preclusion would apply to an unappealed trial court order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994).

Collateral Estoppel

The following elements are required for collateral estoppel to apply:

- (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.

Thompson v. State, Dept. of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999). The purpose of collateral estoppel is to bar the "relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case." *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987). In the present action, claimant seeks to undermine the finality of the prior judgment and create duplicitous litigation by pursuing the present action.

1. The prior and present action involve identical issues because both involve claimant's right to receive benefits under the Industrial Insurance Act for malignant melanoma

Claimant argues the prior and present actions do not involve identical issues. According to the claimant, the issue in the prior action was whether claimant was eligible for time loss benefits and the issue in the present action is whether he is entitled to all workers' compensation benefits.

Appellant Brief at 11. Claimant misinterprets the Industrial Insurance Act. The prior action and the present claim involve identical issues. Both claims involve whether claimant's malignant melanoma was caused by distinctive conditions of his employment and qualifies as an occupational disease under this state's Industrial Insurance Act. What was at stake in the prior action and what is at stake in the present action is whether claimant had the right to receive any benefits under the Industrial Insurance Act for malignant melanoma. See RCW 51.32.010.

Claimant is not allowed to split a single cause of action because "such a practice would lead to duplicitous suits and force a defendant to incur the cost and effort of defending multiple suits." *Landry v. Luscher*, 95 Wn.App. 779, 782, 976 P.2d 1274 (1999). "If an action is brought for part of a claim, a judgment obtained in the action precludes the claimant from bringing a second action for the residue of the claim." *Id.*

If the final and binding determination under the prior action was to allow claimant's malignant melanoma claim for industrial insurance benefits, he would have been entitled to receive medical benefits, time loss benefits and any other benefits contained within Title 51. The prior litigation was about much more than just five weeks of time loss, which claimant now says in hindsight was all he wanted. If his claim was allowed for industrial insurance benefits, he could receive medical benefits for life for the accepted condition and could pursue disability benefits, including but not limited to time loss benefits and total permanent disability benefits. Claimant's assertion that "all workers' compensation benefits" are at stake now for the first time is not true.

The Court should note if in the prior action the malignant melanoma was allowed as an occupational disease and the claim subsequently closed, claimant would have been able to file an aggravation application (See RCW 51.32.160) when he discovered the malignant melanoma had moved (metastasized) to the brain because claimant's brain cancer and satellite lesions are a metastatic cancer, not a new primary cancer. The cancer moved from one part of the body to another.

However, the final and binding determination under the prior action was that claimant DID NOT have a right to receive benefits under the

Industrial Insurance Act for malignant melanoma. As a result, claimant was not only precluded from recovering time loss benefits but was precluded from receiving medical benefits and all other benefits contained within Title 51, including permanent total disability, death, pension, and claim reopening rights.

Claimant appears to argue the employer's analysis on aggravation is not appropriate because the metastasized brain cancer is distinct from the malignant melanoma. *Appellant Brief* at 18. Claimant cites to *Kilpatrick v. Dep't of Labor and Indus.*, 125 Wn. 2d 222, 883 P.2d 1370 (1994) in support of this proposition. The issue in *Kilpatrick* did not involve whether the claimant(s) had compensable claim. All of the workers in *Kilpatrick* had compensable claims as did the surviving spouses. The issue on appeal was whether the Department correctly calculated spousal benefits. It consisted of three consolidated cases.

In *Kilpatrick*, each worker filed a claim for a condition caused by asbestos exposure prior to 1988. *Id.* at 224. In 1988, Legislative amendments were enacted that increased the monthly benefit (death benefits and permanent total disability benefits) from 75% to 100% of the average worker's salary. *Id.* at 224. The three workers died shortly after the effective date of the amendments from a condition caused by asbestos

exposure. *Id.* at 224. The Department calculated the surviving spouse's benefits at 75%, the rate prior to the 1988 amendment. *Id.* at 225. The Department used the original asbestos exposure date (prior to 1988) to determine the surviving spouse's benefits. *Id.* at 227.

On appeal, the surviving spouses argued the survivor benefits should be paid at the rate in place at the time of death or at the rate in place at the time of the manifestation of the final disease that caused the death. *Id.* at 223, 226. The Supreme Court agreed the date of the manifestation of the asbestos-related disease process causing the death should be used in calculating the surviving spouse's benefits rather than the original asbestos exposure date. *Id.* at 232. The Supreme Court stated "the purpose of workers' compensation benefits is to reflect future earning capacity rather than wages earned in past employment, and the application of outdated benefit schedules fails to fulfill that purpose." *Id.* at 230.

2. The prior action resulted in a final judgment on the merits, which claimant does not appear to dispute

The prior action resulted in a final judgment on the merits and claimant does not appear to dispute this. Orders of the department are final and binding if not appealed within 60-days of issuance. RCW 51.52.060(1)(a). *Kingery*, supra, 80 Wn.App. at 708. Orders of the Board

are final and binding if not appealed within 30-days of issuance. RCW 51.52.110. In other words, “[i]f a party to a claim believes the Department erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley*, supra, 125 Wn.2d at 538.

On February 11, 2013, the Board issued its final Decision and Order under the prior action. Claimant appealed to the Snohomish County Superior Court. The appeal was subsequently dismissed with prejudice when the Court signed and granted a Stipulation and Agreed Order of Dismissal. As such, the prior action ended in a final judgment. The prior action resulted in a final and binding determination that claimant’s malignant melanoma was not an occupational disease caused by the distinctive conditions of employment with the City of Everett.

The final judgment on the merits in the prior action is not void. Our courts have said, in order to “prove a Department order was void, a party must show that the Department lacked either personal or subject matter jurisdiction.” *Marley*, supra, 125 Wn.2d at 537. Claimant has not offered any evidence the Department lacked jurisdiction in issuing the original January 3, 2012 order, thereby rendering the order void. The

claimant also has not offered any evidence the Board lacked jurisdiction to hear the matter under Docket No. 12 11709.

3. The prior and present actions involve the same parties, which claimant does not appear to dispute

The prior and present actions involve the same persons and parties and they are qualitatively the same. The prior action involved an appeal filed by claimant, Michael Weaver, from a January 3, 2012 Department order that denied his application for benefits. His employer was the City of Everett. The present action involves an appeal filed by the same claimant, Michael Weaver, from a November 12, 2014 Department order that denied his application for benefits. His employer was the City of Everett.

4. Application of the Doctrine of Collateral Estoppel Will Not Work an Injustice

The Board of Industrial Insurance Appeals has said:

Whether collateral estoppel should be applied with regard to a specific issue should be based on the importance of that issue, as recognized by the parties and the judge at the time of 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, supra, (citing Trautman, “Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash.L.Rev. 805 (1985)). Collateral estoppel must be applied because claim allowance

under the prior action was foreseeably significant in regard to subsequent legal actions given claimant's malignant melanoma diagnosis. Cancer is a serious medical diagnosis, and claimant's cancer is no exception. As noted above, claimant's initial skin tumor was thick (2mm) thus more prone to metastasis. Metastases to the brain or another part of the body are not unusual as malignant melanoma is a cutaneous cancer that has a proclivity to spread rapidly.

Claimant's malignant melanoma was treated surgically by Dr. Byrd on July 6, 2011. Dr. Byrd removed 16 square inches from claimant's back and took a lymph biopsy of his left armpit. Claimant was then referred to Dr. David Abouafia, a specialist in medical oncology, for further evaluation and treatment. His first visit with Dr. Abouafia was on February 9, 2012, well before any testimony had been taken under the prior action. Dr. Abouafia's impression at the first visit was claimant had "a fairly significant cancer diagnosis that could affect his longevity." Clearly, claimant knew his malignant melanoma diagnosis was not just a matter of a couple of weeks of time loss compensation benefits. Claim allowance in the prior action was a vital and foreseeably significant issue for claimant to fully litigate because of cancer's volatile nature, the possibility for it to metastasize, and the ongoing need for medical

treatment. Claimant had or should have had the incentive to fully litigate the prior action. Collateral estoppel should be applied.

Claimant incorrectly tries to analogize the facts of his case to the facts in *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001) and *Sunny Acres Villa Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001). However, these cases are clearly distinguishable.

Sunny Acres is a Colorado case, which does not have precedential value. The claimant in *Sunny Acres* submitted a claim for temporary total disability benefits. *Id.* at 46. The employer accepted the claim and agreed to pay temporary total disability benefits. *Id.* When claimant returned to work in February 1993, it terminated her entitlement to temporary total disability benefits. *Id.* at 46. She was subsequently found to be at maximum medical improvement with a 5% impairment. *Id.* However, the claimant's condition deteriorated and she "requested review and reopening of her TTD award." *Id.* at 46. The judge at that time found claimant's condition had worsened and she was again temporarily totally disabled. *Id.* at 46. The judge included a finding that claimant's physical and psychological impairment had been proximately caused by her work injury. *Id.* at 46

Claimant was next found to be at maximum medical improvement on March 4, 1996. She “requested a hearing to determine her entitlement to permanent total disability.” *Id* at 46. The second judge opined the work injury was not a significant factor to her permanent total disability. *Id.* at 46. On appeal, the claimant argued the second judge was bound by the first judge’s determination of compensability. *Id.* at 46. In deciding collateral estoppel did not apply, the Colorado Court found the employer did not have the same incentive to litigate an award for temporary total disability as it did for permanent total disability and the issue of compensability was therefore not fully and fairly litigated in the prior proceeding. *Id.* at 45. The Colorado Court reasoned, in part, that “one of the primary purposes underlying Colorado’s Workers’ Compensation Act is to ‘assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to employers, without the necessity of any litigation.’” *Id.* at 48 (quoting §8-40-102(1), 3 C.R.S. (2000))

Sunny Acres case is in stark contrast to Washington’s system where, once a claim is allowed, a worker does not have to relitigate the issue of compensability of the claim when his work status changes from temporary total to permanent total disability. In Washington, our Supreme

Court has determined that “[i]f a party to a claim believes the Department erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley*, supra, 125 Wn.2d at 538. If claimant believed the Department had erred in the prior action in deciding claimant’s malignant melanoma was not caused by distinctive conditions of his employment and was not as an occupational disease under this state’s Industrial Insurance Act, he should have pursued his appeal rights. When this case was before the Superior Court, Judge Wynne agreed in his Decision on Administrative Appeal, “this Court does not find the majority opinion in *Sunny Acres*. . . to be compelling, given the Washington statutory scheme.” CP 30 at 7.

In *Hadley*, supra, 144 Wn.2d at 308, Maxwell was found to have committed a traffic infraction,. In a subsequent personal injury action, Hadley asked the Court to apply collateral estoppel to block Maxwell from denying she committed the traffic infraction. *Id.* at 309. The issue was whether application of collateral estoppel would work an injustice against Maxwell. *Id.* at 312. The *Hadley* Court determined a traffic infraction should not have a collateral estoppel effect in a subsequent personal injury action because there was “nothing more at stake than a nominal fine” in

the prior traffic infraction litigation. *Id.* at 308. In other words, “there must be sufficient motivation for a full and vigorous litigation of the issue.” *Id.* at 315. The *Hadley* Court also highlighted the importance of an expeditious system for handling minor traffic cases. *Id.* at 312.

The *Hadley* case is distinguishable. Judge Wynne stated in his Decision on Administrative Appeal, “[t]raffic infractions seldom present a strong motive to defend. They do not involve the same cause of action as a later civil damage lawsuit.” CP 30 at 6. In this case, Weaver’s prior and present action involve identical causes of action and both were reviewed by the Department of Labor and Industries and then by the Board of Industrial Insurance Appeals.

The Washington Supreme Court has stated, “[t]he injustice prong of the collateral estoppel doctrine calls for an examination primarily of procedural regularity.” *Thompson, supra*, 138 Wn.2d at 799. Collateral estoppel may be applied where “a party to the prior litigation had a full and fair hearing of the issues, and did not attempt to overturn an adverse outcome.” *Id.*

Claimant had both the forum and the opportunity to fully and vigorously litigate the prior action. Hearings were held. Both parties presented evidence and claimant was provided the opportunity to cross-

examine the employer's witnesses. Claimant had the opportunity in the prior action to call as many or as few witnesses as he wanted. The witnesses claimant now relies upon would have been available in the prior action and he could have called them had he so chosen. Claimant merely chose to take a different litigation route and strategy in the prior action.

Claimant wishes to present evidence in the present action to show that occupational sun exposure was a cause of his melanoma. *Appellant Brief* at 8. Claimant had the opportunity in the prior action to present evidence that toxic chemicals, sun exposure or any other toxin or chemical was a cause of his melanoma. In fact, evidence **was** presented on sun exposure during the prior action. See finding of fact numbers 5, 6, and 7, in the Board Decision and Order dated February 11, 2013. CP 11 at 264.

The claimant was represented by competent counsel, Ron Meyers. Ron Meyers regularly practices before the Board of the Industrial Insurance Appeals, and has a history of representing firefighters (see e.g. *In re Edward O. Gorre*, BIIA Dec., 09 13340 (2010); *City of Bellevue v. Raum*, 171 Wn.App. 124, 286 P.3d 695 (2012)). Claimant is now unsatisfied with his counsel from the prior action in hindsight because the appeal was unsuccessful. However, being unsuccessful in an appeal does not mean he

had ineffective counsel and does not create an injustice that would prevent the doctrine of collateral estoppel from being applied.

Res Judicata

Claimant is similarly barred by the doctrine of res judicata from proceeding with litigation of the present action. Res judicata is intended to “ensure the finality of judgments and eliminate duplicitous litigation.”

Landry, supra, 95 Wn.App. at 788.

Our courts have said,

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.” *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wash.App. 401, 410, 54 P.3d 687 (2002), *aff’d*, 151 Wash.2d 853, 93 P.3d 108 (2004). Res judicata applies when (1) there has been a final judgment on the merits in a prior action between the same parties; and (2) the prior and present actions involve (a) the same subject matter, (b) the same cause of action, (c) the same persons and parties, and (d) the same quality persons for or against whom the claim is made. *Hisle*, 113 Wash.App. at 410, 54 P.3d 687.

Hyatt v. Dep’t of Labor & Indus., 132 Wn.App 387, 394, 132 P.3d 148 (2006). The analysis for collateral estoppel and res judicata involves much of the same inquiry. Each of the questions needed to apply res judicata can be answered affirmatively as outlined previously.

1. The prior and present action involve the same cause of action.

Courts consider the following factors in determining whether the same cause of action is involved:

- (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. *Hayes v. City of Seattle*, 131 Wash.2d 706, 713, 934 P.2d 1179, 943 P.2d 265 (1997); *Costantini*, 681 F.2d at 1201-02 (9th Cir.1982). The fourth criteria is the most important. *Costantini*, 681 F.2d at 1202.

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Wn.App. 255, 262, 979 P.2d 464 (1999). Claimant tries to argue the prior and present claims do not involve the same cause of action by skewing the definition of “cause of action.” A “cause of action” is not defined by the type of benefit(s) claimant would receive if the claim was allowed. The prior and present action **do** involve the same cause of action because both involve claimant’s right to receive benefits under the Industrial Insurance Act for malignant melanoma.

The claimant cites to *Betts v. Townsends*, 765 A.2d 535 (2000) in support of its argument that the prior and present causes of action are not

the same. The Court should note that is a case from the Supreme Court of Delaware, which does not have precedential value.

According to the court in *Betts*:

Under 19 *Del.C.* § 2347, the Board has statutory authority to review a prior agreement or award "on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed...." Where the Board is asked to reconsider the incapacity or status of a claimant based on one of these specifically delineated changes in circumstances, the doctrine of *res judicata* is inapplicable.

Id. at 534. The court in *Betts* determined the *res judicata* did not apply because it was confronted with a different claim at each hearing: one for temporary total disability and one for permanent partial disability. *Id.* at 535. The Delaware workers' compensation system in 2000 is at odds with the Washington's statutory system and the delivery of benefits as previously outlined.

Weaver's prior and present actions involve the same cause of action. The two suits involve the same right to workers' compensation benefits. Claimant disagrees, reiterating essentially the same argument – "Mr. Weaver's prior claim affected one and only one right: the right to five weeks of temporary benefits. Mr. Weaver's present claim affects his rights to receive permanent disability benefits until he dies." *Appellant*

Brief at 23. The employer maintains that the prior and present actions involve the same cause of action: claimant's right to receive benefits under the Industrial Insurance Act for malignant melanoma.

Claimant cites to *Alishio v. Dep't of Social & Health Services*, 122 Wn.App 1, 91 P.3d 893 (2004) in support his argument that the prior and present action do not involve infringement of the same right. In *Alishio*, Alisho appealed a finding made by DSHS that she neglected her son. *Id.* at 4. Alisho moved for summary judgment on the grounds of res judicata and collateral estoppel because DSHS had previously agreed to an order of dependency. *Id.* at 4. The Court determined the issue of whether claimant neglected her son was not decided in the prior dependency hearing. *Id.* at 3. Therefore, DSHS was not collaterally stopped to assert neglect in a later administrative hearing. *Id.* at 3.

The Court in *Alishio* rejected the argument that the dependency proceeding and administrative hearing involved the same cause of action because "the purposes and functions of the dependency proceeding and the administrative hearing are distinct, and each affect Alisho's rights in different ways." *Id.* at 8. The Court reasoned the causes of action were not the same and res judicata did not apply because:

A dependency proceeding primarily affects Alishio's right to rear her son without State intervention. It prescribes certain requirements that Alishio must fulfill and it authorizes the State to remove M.W. from the home if Alishio does not satisfy certain conditions. In contrast, the administrative hearing on DSHS's investigative findings would do none of these things. Although the findings, if upheld, might ultimately be used to determine Alishio's suitability to work or volunteer with children, they would not inhere the same legal consequences or affect the same rights as the dependency proceeding.

Id. at 8.

In Weaver's case, both the present and prior actions had the same purpose and same function. The cases were heard by the same administrative and judicial bodies. Each affected claimant's right in the same way as has been outlined multiple times: claimant's right to receive benefits under the Industrial Insurance Act for malignant melanoma.

2. There is nothing unfair in applying the doctrine of res judicata

The Board has declined to apply res judicata where "the earlier determination is so inconsistent it would be unfair to apply the doctrine."

In re Keith Browne, supra.

Before a party can be precluded by principles of res judicata from litigating a specific issue at a later time, the party must have had clear and unequivocal notice of issues adjudicated by the prior order, so that the party has had an opportunity to challenge the specific finding. *King v. Department of Labor & Indus.*, 12 Wn App. 1 (1974). Indeed, we have held on several occasions 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. See *In re Lyssa Smith*, BIIA Dec., 86 1152 (1988); *In re Gary Johnson*, BIIA Dec., 86 3681 (1987).

Id. (quoting *In re Rick Yost*, BIIA Dec. 01 24199 (2003)).

In this case, the determination in the prior action is neither inconsistent nor ambiguous. Claimant had clear and unequivocal notice of the issues adjudicated by the prior January 3, 2012 Department order, and claimant had an opportunity to challenge the specific findings. There is nothing ambiguous or inconsistent about the Findings of Fact or Conclusions of Law in the prior action. There is nothing unfair in applying the doctrine of res judicata against claimant under these circumstances.

It would be unfair to the employer if the doctrine were not enforced. The employer went to the time and expense to litigate the prior action. It was determined that claimant's melanoma was not related to his employment as a firefighter with the City of Everett. The employer's interests in the final and binding determination would be destroyed if claimant is permitted to litigate again the same issue and the employer to defend a second time whether the melanoma is related to his employment as a firefighter with the City of Everett. If claimant is permitted to relitigate a final and binding judgment rejecting a claim, should employers be equally permitted to relitigate a final and binding judgment allowing a

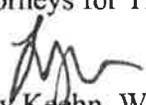
claim? There is an inherent and undeniable benefit not only to this employer, but also to other employers, injured workers, and the Department of Labor and Industries that final orders can be relied upon in terms of finality to ensure orderly claim administration. Judicial resources would be taxed if losing parties were able to relitigate final and binding determinations.

IV. CONCLUSION

Based on the foregoing, the employer respectfully requests the Court of Appeals affirm the December 15, 2016 Decision on Administrative Appeal and the March 29, 2017 Snohomish County Superior Court Order and Judgment.

RESPECTFULLY SUBMITTED THIS 3rd day of August, 2017

Keehn Kunkler PLLC
Attorneys for The City of Everett

By:  WSBA 46692 for:
Gary Keehn, WSBA# 7923
KEEHN KUNKLER, PLLC
810 Third Avenue Suite 730
Seattle, WA 98104
Telephone: (206) 903-0633
Fax: (206) 625-6058
gkeehn@keehnkunkler.com

NO. 76324-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

Michael Weaver,)	
)	CERTIFICATE OF SERVICE
Appellant,)	(Respondent, City of Everett's,
)	Brief of Respondent and
v.)	Cover Letter)
)	
City of Everett,)	
<u>Respondent.</u>)	

I, Kathy Gallagher, hereby certify under penalty of perjury pursuant to the laws of the State of Washington, that I mailed/e-mailed/faxed the following documents:

- Respondent's, City of Everett's, Brief
- Certificate of Service to City of Everett's Brief
- City of Everett's cover letter for its Brief in the Court of Appeals

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Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

T. Jeffrey Keane, Attorney via e-mail to tjk@tjkeanelaw.com and U.S.
Mail to
Keane Law Office
100 NE Northlake Way, Suite 200
Seattle, WA 98105

Alexander Jouravlev, AAG via e-mail to alexanderj@atg.wa.gov and U.S.
Mail to
Office of the Attorney General
P.O. Box 40121
Olympia, WA 98504-0121


Kathy Gallagher, Legal Assistant to
Gary D. Keehn
Keehn Kunkler, PLLC
810 3rd Ave., Suite 730
Seattle, WA 98104
Phone: 206.903.0633
Fax: 206.625.6958
kgallagher@keehnkunkler.com

KEEHN KUNKLER, PLLC

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