

No. 96189-1

NO. 76324-5-I

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

MICHAEL WEAVER,

Appellant,

v.

CITY OF EVERETT and DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

**DEPARTMENT OF LABOR AND INDUSTRIES'
BRIEF OF RESPONDENT**

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I. INTRODUCTION

A party cannot litigate the same claim twice. In a previous case, the Board of Industrial Insurance Appeals analyzed medical evidence from Michael Weaver and the City of Everett and concluded, in a final decision, that Weaver's work as a firefighter did not cause his melanoma. Now, unfortunately, that same melanoma has spread, and Weaver asks for a second chance to prove that his work caused his melanoma.

But, as the Board and superior court rightly concluded, Weaver cannot again argue that his work caused the same melanoma. The doctrines of collateral estoppel and res judicata preclude him from doing so. Collateral estoppel (or issue preclusion) prevents Weaver's new attempt to obtain workers' compensation benefits because the Board resolved the causation issue against him in the previous case: work-related sun exposure did not cause the cancer. Under res judicata (or claim preclusion), a party cannot re-litigate the same cause of action on the same subject matter against the same parties. That is what Weaver seeks to do, by arguing that the same cancer (now metastasized) arose from his work as a firefighter with the City.

This Court should affirm.

II. STATEMENT OF THE CASE

Under well-established principles of collateral estoppel and res judicata, a party cannot re-litigate an issue or claim adjudicated with a final decision. The Board has issued a final decision concluding that Weaver's work as a firefighter did not cause his melanoma.

1. Does collateral estoppel preclude Weaver from rearguing that his firefighting caused his melanoma?
2. Does res judicata preclude him from re-arguing that he may have workers' compensation benefits?

III. STATEMENT OF THE CASE

A. **When Medical Evidence Demonstrates That Work Caused an Injury or Occupational Disease, a Worker May File for Benefits Under the Industrial Insurance Act**

Workers may file workers' compensation claims for industrial injuries or occupational diseases. RCW 51.28.020(1)(a); RCW 51.08.100, .140; RCW 51.16.040; RCW 51.32.010, .180. For a given industrial injury or occupational disease, the Department's practice is that the worker need file only one claim to receive benefits for that injury or occupational disease. RCW 51.28.020(1)(a). To prove an occupational disease, the worker must show that his or her disease arose naturally and proximately out of the specific employment. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); RCW 51.08.140 (definition of occupational disease).

For firefighters, however, the law provides a “prima facie presumption” that certain diseases are occupational diseases (such as malignant melanoma). RCW 51.32.185(1); *Spivey v. City of Bellevue*, 187 Wn.2d 716, 727, 389 P.3d 504 (2017). The firefighter need not come forward with evidence that establishes that the disease arises naturally and proximately from his or her employment. *Raum v. City of Bellevue*, 171 Wn. App. 124, 141, 286 P.3d 695 (2012). Instead, if the firefighter meets the requirements of RCW 51.32.185 and otherwise qualifies, the Department presumes that the worker may have benefits. RCW 51.32.010, .180, .185.

The law also specifies that the employer may rebut the firefighter presumption. RCW 51.32.185; *Spivey*, 187 Wn.2d at 727. The employer may do so by establishing among other factors that the firefighter’s lifestyle, hereditary factors, or exposure from non-employment activities caused the disease. RCW 51.32.185(1); *Spivey*, 187 Wn.2d at 727. If the employer provides a preponderance of evidence to rebut the presumption, the firefighter may still receive benefits by proving that the disease arose naturally and proximately from his or her employment. *See Spivey*, 187 Wn.2d at 727; *Gorre v. City of Tacoma*, 184 Wn.2d 30, 33, 357 P.3d 625 (2015); *Raum*, 171 Wn. App. at 141; RCW 51.08.140. If the employer does not rebut the presumption, or if the worker makes the necessary

showing if the employer rebuts the presumption, then the Department will allow the claim.

An employer may contest allowance of a claim at the Board.

RCW 51.52.050, .060. Workers' compensation practitioners refer to these cases as "allowance" cases.

If the Department's decision to allow the claim stands, the Department's position is that a worker becomes eligible for all benefits under the Industrial Insurance Act, provided the facts support the benefit. RCW 51.32.010, .180; RCW 51.16.040; *see Boeing Co. v. Doss*, 183 Wn.2d 54, 57, 347 P.3d 1083 (2015); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 674-75, 175 P.3d 1117 (2008), *aff'd on other grounds*, 169 Wn.2d 81 (2010). After the claim is allowed, the Department determines eligibility for proper and necessary treatment and temporary wage replacement benefits (temporary total disability, also called time-loss compensation) if the worker cannot work while receiving treatment. RCW 51.36.010; RCW 51.32.090; WAC 296-20-015; WAC 296-20-01002 (definitions of "proper and necessary" and "total temporary disability").¹

When necessary treatment is complete and the worker's condition is "fixed" and stable (maximum medical improvement), the Department

¹ If the worker cannot return to the job of injury, he or she may be eligible for vocational benefits. RCW 51.32.095, .099.

determines whether the worker should receive either permanent partial disability or permanent total disability benefits. RCW 51.32.055, .060, .080; WAC 296-20-01002 (definition of “proper and necessary”); *Franks v. Dep’t of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). A worker has a permanent partial disability if the worker has sustained a loss of function because of an injury or occupational disease, but remains capable of gainful employment. *See* RCW 51.08.150; RCW 51.32.080; WAC 296-20-200(4); *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). A worker has permanent total disability if the injury or occupational causes the worker to be permanently incapable of any gainful employment. RCW 51.08.160.

If a work injury or occupational disease permanently and totally disables a worker, the worker receives a pension, which is a lifetime wage-replacement benefit. RCW 51.32.060. In certain circumstances, a surviving spouse may receive benefits if the worker dies. RCW 51.32.050, .067(1).

After a claim is closed, a worker can seek to reopen it if the worker’s condition worsens. RCW 51.32.160; *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993); *Lewis v. ITT Cont’l Baking Co.*, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979); *Cooper v. Dep’t of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015). To reopen,

the worker need not prove claim allowance again, only that the condition that proximately caused the occupational disease objectively worsened. *Id.*

B. The Board Determined in a Final Order That Weaver's Work Did Not Cause His Melanoma, So He Was Not Eligible for Any Workers' Compensation Benefits

Weaver has a history of sunburns and outdoor activities. *See* AR 289-90, 305-06.² In June 2011, a biopsy of an atypical mole on Weaver's back revealed a malignant melanoma. AR 137. The following month, a surgeon cut out 16 square inches of skin from Weaver's back and took a lymph biopsy. AR 131, 289.

Weaver describes the melanoma diagnosed in 2011 on his upper back as "a minor skin cancer" and "a modest melanoma." Brief of Appellant (AB) 1. The medical evidence, including the evidence that Weaver presented, describes the original cancer as a "high risk melanoma." AR 298 (per John Hackett, M.D.). Doctors described it as a "malignant" melanoma. AR 137, 196 (per Carl Brodtkin, M.D., and Kenneth Coleman, M.D.). Malignant means "tending to become progressively worse and to result in death." *Dorland's Illustrated Medical Dictionary* 1099 (32d ed. 2012). And Weaver's treating oncologist, David Aboulafia, M.D., observed that the biopsy showed that "this is a cancer that has potential for spread" based on the cell division rate and "he

² This brief cites the certified appeal board record as "AR." The Board record consists of three consecutively paginated volumes.

had a fairly significant cancer diagnosis that could affect his longevity.”

AR 127.

In 2011, Weaver applied for industrial insurance benefits with the City of Everett, a self-insured employer, for his malignant melanoma.

AR 246, 250. In January 2012, the Department issued an order denying the application for benefits because it concluded that Weaver had no occupational disease. AR 278. Weaver appealed to the Board. AR 252.

At the administrative hearing, the City presented medical evidence that Weaver’s occupation did not cause his melanoma and that he would have developed melanoma due to his skin, hair, and eye color and history of severe sunburn. AR 258-61. Weaver presented medical testimony that Weaver’s occupation as a firefighter did cause his malignant melanoma.

AR 256-57.

In its decision, the Board found that his firefighting work exposed Weaver to sunshine. AR 3, 263. But the Board concluded that the City had rebutted the presumption for firefighters that Weaver’s occupation caused his melanoma. AR 3, 264. It further concluded that Weaver’s melanoma did not arise naturally and proximately out of his occupation as a firefighter. AR 3, 263-64. Weaver appealed to superior court, but later agreed to dismiss his appeal with prejudice. AR 122, 247, 266-68.

C. After the Same Melanoma Recurred, Weaver Filed a New Workers' Compensation Claim, but the Department, Board, and Superior Court Agreed He Could Not Re-Litigate Whether His Occupation Caused His Melanoma

In January 2014, Weaver complained about his ability to recall words, and a medical evaluation showed that his cancer had spread to his brain. AR 318-19. In July 2014, he filed a second application for industrial insurance benefits with the City of Everett. AR 280. This claim is the present claim on appeal.

In November 2014, the Department issued an order rejecting the new claim because the new claim involved the same cancer:

The claim is rejected for the following reason:

This claim was filed for the same cancer that was denied previously by the Department of Labor and Industries and the Board of Industrial Insurance Appeals on Claim SG-15654.

AR 281. Weaver appealed to the Board, and the City moved for summary judgment, arguing that collateral estoppel and res judicata precluded the new claim because the Board had determined that Weaver's melanoma was not an occupational disease. AR 63-65, 229-45.

To support its summary judgment motion, the City presented the declarations of Dr. Hackett, a Board-certified dermatologist, and Robert Levenson, M.D., a Board-certified medical oncologist, both of whom had testified in the previous case. AR 282-85, 295-98. Dr. Hackett

reviewed the new medical records from 2014 and 2015 and concluded, “The recently diagnosed brain lesions were metastases from the original cutaneous melanoma.” AR 297. He believed that the “brain cancer and two satellite lesions are metastases from Mr. Weaver’s original high risk melanoma” AR 298. He observed that Weaver’s initial skin tumor was thick and that that “[r]ecurrent metastases to the brain or lung were a typical course for a thick melanoma.” AR 297. Dr. Levenson agreed, concluding after he reviewed the additional records that “Mr. Weaver’s brain cancer and two satellite lesions are a metastatic cancer, not a new primary cancer and are the same cancer (malignant melanoma) which I saw Mr. Weaver for on November 28, 2011.” AR 285. Metastasis means “a growth of . . . abnormal cells distant from the site primarily involved by the morbid process.” *Dorland’s* at 1144. The capacity to metastasize is a characteristic of all malignant tumors. *Id.*

In response to the motion, Weaver submitted declarations from co-workers about his sun exposure during his firefighting work³ and declarations from Dr. Aboulafia, his treating oncologist, Dr. Brodtkin, an occupational and environmental medicine physician, and Dr. Coleman, who testified in the first case. AR 99-109, 134-45, 195-97. Dr. Aboulafia

³ Although the declarations did not identify the dates of Mr. Weaver’s sun exposure, they discussed the period from 1996, when Mr. Weaver began working as a firefighter for the City of Everett. AR 99, 102, 104, 106.

stated in his declaration that “despite our best medical efforts Mr. Weaver’s melanoma returned and metastasized to his brain.” AR 109. Dr. Brodtkin stated that, after the surgical excision of the skin tumor, “Mr. Weaver subsequently developed distant metastasis to the brain.” AR 138. He detailed the history of Weaver’s sun exposure over his lifetime and 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.” AR 144. After reviewing medical records from 2014, Dr. Coleman opined that “Mr. Weaver’s exposures as a firefighter, on a more probable than not basis, were a cause of his malignant melanoma and his subsequent brain metastatic malignant melanoma.” AR 196.

The Board granted summary judgment to the City and affirmed the Department order denying the claim because it was the same cancer. AR 57-62. The Board concluded that Weaver had filed “a second industrial insurance claim for the same condition” and concluded that he was “precluded from re-litigating the issue on appeal.” AR 59-60.

On summary judgment, the superior court affirmed, concluding that (1) the Department and Board had jurisdiction over the subject matter and the claimant, (2) the Board’s decision on Mr. Weaver’s first claim was a final order, and (3) Mr. Weaver’s second claim involved the same issue

that factually and legally was the subject of the first claim, precluding his appeal. CP 17-18.

Weaver now appeals to this Court. CP 1.

IV. STANDARD OF REVIEW

In a workers' compensation appeal, the court reviews the superior court decision under the ordinary civil standard of review and, unlike review under the Administrative Procedure Act (which does not apply), the court does not review the Board decision directly. RCW 51.52.140; RCW 34.05.030; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The court reviews the grant of summary judgment de novo. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). The court grants summary judgment where no disputed material issues of facts exist, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). Speculation and conclusory allegations are insufficient to avoid a summary judgment. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009).

The court reviews collateral estoppel and res judicata issues de novo. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (2007).

V. ARGUMENT

Either under collateral estoppel or res judicata, the Court should conclude that Weaver has raised the same issue and claim that the Board decided before, so he may not raise them now. Weaver's arguments hinge on two theories. First, he indirectly argues that the two cases involve different cancers because they involve different treatments. *See* AB 19-20. The medical evidence belies his suggestion as his witnesses concede it was a metastatic cancer, meaning not a new primary cancer but the original cancer arising again. AR 109, 196; *see also* AR 298.

Second, Weaver argues that the first case was about time-loss compensation and the second was about a pension. AB 11, 15, 22-23. Not so. They were both about claim allowance. AR 59, 73, and 253, 263-64, 278. If the Department had initially allowed the claim, he would have been eligible for time-loss compensation and a pension if the facts supported the award.

Weaver now seeks allowance of a workers' compensation claim about the same cancer but, because the Board previously denied allowance of this cancer, the trial court properly affirmed the Department decision rejecting his second attempt to seek allowance of the cancer claim.

A. All the Medical Evidence Supports That Weaver’s Recurrent Cancer Is the Same Cancer Diagnosed in 2011, with a Final Determination That Weaver’s Job Did Not Cause That Cancer

The Department was correct to deny the new claim because it involved the same cancer. Key here, no evidence disputes that the cancer identified in Weaver’s brain in 2014 is the same cancer discovered on his back in 2011. He concedes that the original cancer “later metastasize[d] to his brain” and that the surgical pathology report after his brain surgery “showed the tumor was metastatic melanoma.” AB 1, 5; AR 320. As explained above, metastasis means “a growth of abnormal cells distant from the site primarily involved by the morbid process.” *Dorland’s* at 1144.

The medical opinions in the declarations that the City and Weaver submitted follow his concession that this case involves a metastatic cancer, not a new cancer. His oncologist opined “despite our best medical efforts Mr. Weaver’s melanoma *returned* and metastasized to his brain.” AR 109 (emphasis added). Dr. Coleman characterized the cancer in his brain as “subsequent brain *metastatic* malignant melanoma.” AR 196 (emphasis added). Dr. Hackett and Dr. Levenson agreed that the cancer and lesions in the brain were metastases from the original melanoma. AR 285, 297.

According to Dr. Hackett, it was “not a new primary cancer.” AR 298. Weaver introduced no evidence that rebutted that it was not a new primary cancer. In the absence of refutation, this fact stands. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (nonmoving party must rebut moving party’s claims).

Similarly, Weaver did not present medical evidence that a new work exposure to sunlight or another carcinogen after January 2012 (the date of the Department’s order in the previous litigation) caused the cancer in his brain in 2014. Instead, his own expert Dr. Brodtkin believed that his “intermittent exposure to ultra-violet radiation (UVR) from sunlight as a *firefighter between 1996-1998 and the early 2000’s*” was a cause of his malignant melanoma. AR 144 (emphasis added). This entire period preceded the January 2012 order at issue in the previous litigation.

Despite conceding that his original cancer metastasized to his brain (AB 1), Weaver says the “only similarity between Mr. Weaver’s metastatic brain cancer and the scapular lesion he had earlier is a similar cell type.” AB 19. He points out that the gravity, treatment, “systemic effects,” and likely outcome of “these two disease processes” are different. AB 19. But none of this means the cancer in Weaver’s brain in 2014 is not the same cancer found on his back in 2011. And none of the medical declarations that he submitted support that these are different cancers. He

bases his suggestion that they are two different cancers on nothing more than improper speculation and conjecture. *See Boguch*, 153 Wn. App. at 610, (speculation and conclusory allegations are insufficient to avoid a summary judgment).

Because no medical evidence shows that the metastatic cancer in his brain is a new cancer, or shows that a new work exposure after the final January 2012 order caused this cancer, Weaver asks this Court to re-litigate the cause of his original cancer. But the Board already determined that his occupation did not cause that original cancer, and because he dismissed his later appeal, that final determination binds him. He cannot litigate again what has been decided.

B. Collateral Estoppel and Res Judicata Both Apply Because This Case Involves an Allowance Dispute, not Separate Cases or Issues About Time-Loss Compensation of Pension

1. In both cases, Weaver has a claim for allowance – not a claim for time-loss compensation or a pension

Raising a theory that has no support in Washington law, Weaver argues there are two different issues and two different causes of action in each case because there are purportedly two separate workers' compensation claims defined by the type of benefits sought. AB 11, 15, 23. He says one case is about time-loss compensation and one is about a pension. AB 11, 15, 23. The Industrial Insurance Act does not provide for

separate claims defined by the type of benefit, but rather provides a unitary claim for all benefits. RCW 51.28.020 (“[w]here a worker is entitled to compensation under this title he or she shall file with the department or his or her self-insured employer, as the case may be, his or her application for such . . .”).

There is no such thing as “a claim for treatment,” “a claim for time-loss compensation,” or “a claim for pension.” Instead, RCW 51.28.020 permits one application for all benefits.⁴ In the case of an occupational disease, the worker files the claim for a period of exposure to the distinctive conditions of employment that caused the occupational disease. RCW 51.08.140; RCW 51.32.180; *Dennis*, 109 Wn.2d at 467 (condition must be caused by the actual conditions of employment). The worker must show that his or her disease arose naturally and proximately out of the specific employment. RCW 51.08.140; *Dennis*, 109 Wn.2d at 481. And RCW 51.32.185 gives the firefighter a presumption that the condition of malignant melanoma arose naturally and proximately out of employment, which the employer may rebut. *Spivey*, 187 Wn.2d at 727.

⁴ After a worker no longer requires treatment, a worker may request the Department determine whether his or her condition is entitled to permanent disability benefits. RCW 51.32.055. But a request is not required to receive permanent disability benefits, and a worker does not file a new application for workers’ compensation benefits to receive permanent disability benefits. *See* RCW 51.32.055, RCW 51.28.020.

Upon allowance of that unitary claim, the worker is eligible for all benefits for which the worker is entitled based on the facts.

RCW 51.32.010, .180; RCW 51.16.040; *see Doss*, 183 Wn.2d at 57; *Kustura*, 142 Wn. App. at 674-75. RCW 51.32.010 provides that workers injured in the course of employment may receive the benefits established in RCW 51.32, which includes treatment, time-loss compensation, vocational services, permanent partial disability, pension benefits, and survivor's benefits. RCW 51.32.050, .060, .067, .080, .090, .095; RCW 51.36.010.⁵ All these benefits can flow from claim allowance.

Weaver argues that he could not raise the pension or survivor's issue in the first case, so therefore the first case's decision does not preclude him from raising the issue now because it was impossible for him to raise the issue then. AB 21-22. He misunderstands the workers' compensation process. He first had to prove that his work caused melanoma to have his claim allowed. If he prevailed on claim allowance in the first case, he would have been eligible for the Department to make further decisions regarding treatment, time-loss compensation, permanent partial disability, pension benefits, and/or survivor's benefits, depending on what the facts established. His assertion that the first claim affected

⁵ The Industrial Insurance Act gives the same benefits to workers sustaining occupational diseases as to those sustaining industrial injuries. RCW 51.16.040; RCW 51.32.180.

only one right—“the right to five weeks of temporary payments”—is wrong. AB 23. That assertion ignores that the first cause of action decided *eligibility* for any type of benefits. RCW 51.32.010, .180; RCW 51.36.010; RCW 51.16.040.

Weaver seeks to circumvent well-established principles of workers’ compensation litigation by asserting that his new second claim is about pension benefits. But, at the Board, the Department order fixes the issues on appeal. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (Board “review[s] the specific Department action” from which the party appealed); *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994); *In re Houle*, No. 00 11628, 2001 WL 395827, at *2 (Wash. Bd. of Indus. Ins. Appeals Feb. 22, 2001). This means the Board cannot determine issues the Department has not. Applied here, this means the second case is not a case about a pension. Like the first case, it is about whether the Department should allow the workers’ compensation claim. Any decision about the extent of benefits would come in the future.

Weaver conflates what happens after claim allowance, which is the award of relevant benefits, with the initial decision to allow the claim. The latter does not inform on the former. Indeed, the Board has said that issues other than claim allowance are not relevant in a case about claim

allowance. *In re Spriggs*, No. 07 24270, 2009 WL 1504259, at *9 (Wash. Bd. of Indus. Ins. Appeals Mar. 24, 2009) (Board could not consider issue of benefits rate date in allowance case); *In re Houle*, 2001 WL 395827, at *2 (exceeded Board's scope of review to consider whether condition was temporary or permanent in allowance case).⁶

2. Had the Department initially allowed Weaver's claim he could apply to reopen his claim on the cancer's reoccurrence – this is because it is the same cancer

If the Board had ordered the Department to allow Weaver's original claim, it would have remanded the case to the Department to consider what benefits he should receive. *E.g.*, *In re Spriggs*, 2009 WL 1504259, at *11 (after determining claim should have been allowed, the Board remanded the case to the Department to allow the claim and take further action). The Department would have ordered benefits and then closed the claim. Upon the cancer's reemergence, had the Department allowed the original claim, Weaver could have applied to reopen his claim by demonstrating his condition had become worse or aggravated. RCW 51.32.060, .090, .160; *Cooper*, 188 Wn. App. at 648 (Department may reopen claim upon medical proof of objective worsening of condition caused by industrial injury).

⁶ The court gives "great deference" to the Board's interpretation of the Industrial Insurance Act. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

The ability to reopen a claim because of aggravation shows that there is one unitary claim. Weaver relies on *Kilpatrick v. Dep't of Labor and Indus.*, 125 Wn.2d 222, 229, 883 P.2d 1370, 915 P.2d 519 (1994), to argue that the aggravation analysis does not apply. AB 18-19. But *Kilpatrick* involved a different issue and its analysis supports the Department, not Weaver. In *Kilpatrick*, each of the three workers developed a variety of unrelated diseases because of the same occupational exposure. *Kilpatrick*, 125 Wn.2d at 224-26. The Department argued that since the different diseases arose out of the same occupational exposure they were one occupational disease, even though the most recently developed disease was not an aggravation of the original illness. *Id.* at 229-30. The workers argued that since the diseases had distinct pathologies and latency periods, and since the later developed diseases did not arise out of the first disease that developed, each disease was a distinct occupational disease claim. *Id.* The Court agreed with the workers, concluding that since the diseases themselves were pathologically distinct from each other and since the newer-developed disease did not arise out of the older one, the newer disease was not as an aggravation of the first one and instead was a distinct occupational illness. *Id.* at 230-31.

But here the opposite is true: it is undisputed that Weaver's current condition grew directly out of his original disease and is an

aggravation of it. Weaver's original disease—skin cancer—metastasized, leading to his current severe illness. AR 284-85, 297-98. Under *Kilpatrick*, whether a new medical problem is an aggravation of the original illness or a separate disease turns on whether the new problem arose out of the original illness or whether it is a new illness that happens to have arisen out of the same occupational exposure. *Kilpatrick*, 125 Wn.2d at 230-31. Since Weaver's current illness arose directly out of his original disease, it is part of the same disease process and is the same occupational disease. AR 284-85, 297-98.

Weaver emphasizes that *Kilpatrick* mentioned that the workers' different diseases required different forms of treatment, and notes that the metastasis of his original illness required different treatment. AB 19-20. But the *Kilpatrick* court held the workers had different diseases that were not aggravations of each other, not just that the workers required new forms of treatment. *Id.* at 230. And a worker with an aggravation of an injury will often require a new form of treatment because of that aggravation, and it would make no sense to treat an aggravation of an occupational disease as a new occupational disease any time there was a new form of treatment.

Rather than rely on Washington State law about workers' compensation claims, Weaver points to Delaware law in *Betts v.*

Townsend, Inc., 765 A.2d 531 (Del. 2000). In *Betts*, the administrative body had initially decided a claim for temporary total disability, finding that the industrial injury caused the temporary condition. *Id.* at 533. It then had to consider whether the industrial injury also caused the worker's permanent condition, and it concluded it did not. *Id.* This case stands for the unremarkable proposition that to prove disability, a worker must show proximate cause. *See Betts*, 765 A.2d at 535; *Dennis*, 109 Wn.2d at 470; (occupational disease must arise naturally and proximately out of employment); 6A *Washington Practice: Washington Pattern Instructions: Civil* 155.06 (6th ed. 2005) (party must prove proximate cause). Weaver seems to argue this case stands for the proposition that a claim for temporary total disability is one workers' compensation claim and a claim for permanent partial disability is another workers' compensation claim. *See* AB 20-21. Even if this was true under Delaware law (and that is doubtful), it is not true in Washington State. In Washington, one unitary workers' compensation claim makes a worker eligible to claim all benefits that the facts warrant. RCW 51.32.010, .180; RCW 51.28.020; *see Doss*, 183 Wn.2d at 57-58 (workers' compensation claim entitles claimant to medical as well as disability benefits).⁷

⁷ Our courts have warned against using case law from foreign jurisdictions in workers' compensation matters because they do not have the unique features of

C. Collateral Estoppel Bars Weaver’s Appeal Because the Same Parties Have Already Litigated the Same Issue – Causation of Weaver’s Melanoma

Weaver’s collateral estoppel claim fails because the core issue in both cases—causation of Weaver’s melanoma—is the same. Collateral estoppel, or issue preclusion, bars re-litigation of an issue in a later proceeding involving the same parties. *Christensen*, 152 Wn.2d at 306 (citation omitted). It promotes principles of judicial economy and repose. *Id.* at 306-07.

The courts give a Board decision about whether a given occupational exposure caused an occupational disease preclusive effect under a theory of collateral estoppel. *McCarthy v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 812, 823, 759 P.2d 351 (1988) (Board decision about pulmonary condition has preclusive effect). Collateral estoppel applies if:

1. Both proceedings present identical issues;
2. The earlier proceeding ended in a judgment on the merits;
3. The party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and
4. Application of collateral estoppel works no injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307.

Washington’s Industrial Insurance Act. *Thompson v. Lewis Cty.*, 92 Wn.2d 204, 208-09, 595 P.2d 541 (1979).

All four elements apply here. (1) The issue in both cases is identical: whether his melanoma arose naturally and proximately out of his work as a firefighter. (2) The Board's decision is a final judgment because Weaver dismissed his superior court appeal. *See* RCW 51.52.110. (3) Weaver was a party to the previous litigation. (4) There is no injustice because Weaver had a full and fair opportunity to present medical evidence to prove that his occupation caused his melanoma.

1. The issues are identical: Causation

Weaver contests the first and fourth elements. Weaver contests the first element (identical issues) and the last element (justice) on the same theory: he says he was seeking time-loss compensation in the first case and a pension or survivor's benefits in the second case, and so the issues are different and it would be unjust to apply collateral estoppel. AB 9-20. But, as explained above, his premise that there were two cases—a time-loss compensation case and a pension case—is flawed. The issues in the first case and the second case are the same: whether Weaver showed that his melanoma arose proximately and naturally out of his employment to justify claim allowance under RCW 51.32.180 and RCW 51.08.140.

The key fact here is that the first case litigated causation and Weaver now seeks to litigate causation in the second case. Thus, the issues are identical. That he wants a pension or survivor's benefits (and likely

treatment) now but only wanted time-loss compensation then does not create different issues. If the Board had allowed the claim in the first case, Weaver would have been eligible for all workers' compensation benefits. The Board would have remanded the case to the Department to determine what benefits to provide. The Department would have ordered the benefits, and closed the claim when appropriate. Weaver then likely would have been successful in applying to reopen his case when the cancer reappeared to obtain further benefits under RCW 51.32.160.

See Cooper, 188 Wn. App. at 648 (under aggravation statute, the Department will reopen claim when worker's condition objectively worsens).

What Weaver wants now is what he wanted previously: a determination that sun exposure at work caused his cancer. He wants to re-visit an identical issue he lost. The case here amply proves the identity requirements.

2. It is just to apply collateral estoppel because a case about claim allowance commands a full litigational effort because it effects future benefits

Nor is there any injustice here to applying collateral estoppel. When looking whether to apply collateral estoppel from administrative proceedings, the court determines whether sufficient incentive existed for

the concerned party to litigate vigorously in the administrative hearing. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 453, 951 P.2d 782 (1998).

If it was foreseeable that the first action could affect future rights, then it is just to apply collateral estoppel. *State v. Hite*, 3 Wn. App. 9, 15, 472 P.2d 600 (1970). Weaver argues that there nothing in the record showing that, in the first case, someone told him that the result in the first case would be the same in the second case if his cancer arose again.

AB 10. But he cites no authority that the party asserting collateral estoppel needs to show the opposing party's subjective knowledge about the consequences of future cases at the time of the first case. The court does not consider arguments unsupported by citation to authority. *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015).

In any event, his subjective knowledge is not relevant. A claim of ignorance over the consequences of a legal action is not a defense.

Leschner v. Dep't of Labor & Indus., 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (there is a "universal maxim that ignorance of the law excuses no one"). The court is concerned only with the "interests at stake" in the first litigation. *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600 (2001) (citation omitted). Interests are not subjective, but objective.⁸

⁸ In passing, Weaver points to case law about public policy overriding collateral estoppel claims. AB 18. Even if this were true, he identifies no public policy issue

Objectively speaking, because claim allowance can affect future benefits, Weaver had an incentive to vigorously litigate claim allowance in the earlier proceeding. That is because what was at issue in the previous case was not simply entitlement to temporary disability benefits. As the Board's decision shows, what was at issue was whether Weaver had an occupational disease at all. AR 3, 253, 264. Establishing this was a necessary precursor to receiving any benefits, including permanent disability benefits in the future.

Arguing for new law, Weaver argues that in Washington State, there are minor and major workers' compensation cases, and collateral estoppel does not apply to minor cases when a party is purportedly not motivated to litigate them. AB 15. He further postulates the first case was about temporary total disability (a claim he says is minor) and the second case is about permanent total disability (a claim he says is major), and so he argues there was a disparity in relief and claims he was not motivated to vigorously litigate the first case. AB 15.

These arguments fail for five reasons. First, he cites no Washington State authority that some workers' compensation cases are minor and some are major. Given that the Legislature designed all benefits to reduce disability and eliminate economic suffering, Washington state

presented in the second case that is not present in the first case. There is none since the cases are the same: allowance of a workers' compensation claim.

law does not support such a distinction. *See* RCW 51.04.010; RCW 51.12.010; RCW 51.36.010.⁹ What Weaver's theory opens the door to is the Department or employer later urging the court to not honor a decision in a workers' compensation claim because the first case was "minor." So while Weaver's theory in this case benefits him, it hurts other workers' compensation claimants.

Second, this is not a case about temporary total disability versus permanent total disability, as Weaver believes. AB 15. Rather, as discussed above, it is a case about claim allowance. There is no disparity in relief because the issues are the same: all allowance cases are "major" cases if Washington State law permits such a semantic distinction. This is because Washington State law enables a worker to claim all benefits subject to medical proof and because a condition may worsen in the future so that the worker may seek to reopen his or her workers' compensation

⁹ Washington State law has not distinguished temporary total disability (time-loss compensation) and permanent total disability as minor and major cases. Instead, the law views them as the same type of case except as to duration where permanent total disability garners permanent benefits. *See Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970). As a practical matter, a collateral estoppel or res judicata issue has limited relevance; eligibility for temporary total disability benefits does not establish eligibility for permanent total disability benefits because a worker has to prove the permanence of the disability proximately caused by the industrial injury. RCW 51.32.060, .090; *Allen v. Dep't of Labor & Indus.*, 30 Wn. App. 693, 697-98, 638 P.2d 104 (1981); *Wilson v. Dep't of Labor & Indus.*, 6 Wn. App. 902, 904, 496 P.2d 551 (1972). The only precluded issue is whether the injury caused the condition, but there would be no preclusion as to whether the accepted condition in turn caused permanent disability.

claim. RCW 51.32.160.¹⁰ What Weaver sought in the first hearing was a determination that firefighting work caused the cancer. AR 253. That is not a minor issue, especially as cancer can recur. All future benefits turned on his ability to prove causation.

Third, the foreign case law he cites, *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001), involves an inapposite issue. In this Colorado case, the court noted that collateral estoppel does not apply if the parties did not have the incentive to litigate an issue vigorously. *Id.* at 47. The court would not apply collateral estoppel to a causation question decided in a claim for temporary total disability to a claim for permanent total disability because the stakes were lower in the temporary total disability case and the employer would have more incentive to litigate vigorously the permanent total disability case. *Id.* at 47, 49. From *Sunny Acres*, Weaver distinguishes between “minor” cases such as temporary total disability cases and major cases such as permanent total disability cases. AB 13-16.

¹⁰ In particular, Weaver had an incentive to litigate his first case given his cancer’s nature. The cancer’s malignancy made it foreseeable that he or his family might need workers’ compensation benefits in the future. He sought coverage for a condition in which he had 16 square inches of skin removed—hardly a minor dispute. AR 131, 285, 298. But the Department does not think the seriousness of Weaver’s condition is the pivot point in the analysis for workers’ compensation claims because allowance of a workers’ compensation case is a major issue in all cases. This is because even if a claim is relatively minor in the beginning, things can change in the future.

Even if Washington State law would support such a distinction (it does not), the situations are different. This is not a case about whether the first case was about temporary total disability and the second case was about permanent total disability, it is about claim allowance. The *Sunny Acres*' issue and this case's issue are apples and oranges.¹¹

Fourth, Weaver misplaces reliance on *Hadley* because the stakes in litigating a traffic infraction with a \$95 maximum penalty differ in magnitude from the stakes in litigating allowance of an occupational disease claim. *Hadley*, 144 Wn.2d at 312. Allowance of a workers' compensation claim makes a worker eligible for a panoply of benefits, so a worker has a strong incentive to litigate the allowance of the claim. In contrast, in *Hadley*, the court declined to hold an individual liable in a civil claim involving a traffic incident because the individual had failed to contest a citation involving the same incident. *Id.*

The court in *Hadley* explained that, in determining whether an injustice would be done, the court could "consider whether 'the party against whom the estoppel is asserted [had] interests at stake that would

¹¹ Unlike Washington State's statute, the Colorado statute authorizing reopenings allows an administrative law judge to revisit a claim at any time within six years after the date of injury, to review and reopen any award of benefits. Colo. Rev. Stat. Ann § 8-43-303; *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). In Washington State, on the other hand, unless a claimant appeals a Department's decision within 60 days, the decision becomes final and cannot be relitigated. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 536, 886 P.2d 189 (1994).

call for a full litigational effort.’ ” *Hadley*, 144 Wn.2d at 312 (quoting 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 373, at 763 (5th ed.1996)). Weaver’s own actions undermine his argument here and demonstrate that he mounted a vigorous litigational effort in the first case. He secured an attorney and presented medical testimony in the context of an adversarial proceeding that applies the civil rules. *See* RCW 51.52.140 (civil practice applies in workers’ compensation appeals).

Finally, the injustice prong primarily involves an examination of “procedural regularity.” *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999). The *Reninger* court found that an administrative decision had preclusive effect because of procedural fairness. The basis for the *Reninger* holding was that the appellants were “afforded and took advantage of numerous procedures” that exist in superior court trials. *Reninger*, 134 Wn.2d at 451 (unemployment compensation case had preclusive effect on discrimination case). The *Reninger* appellants were represented by counsel who gave opening and closing arguments, called witnesses on their behalf, and cross-examined the State’s witnesses. *Id.* Similarly, counsel represented Weaver and fully litigated the first case: calling witnesses on his behalf, with many of the rights of a superior court trial. *See* AR 252, 274-76, 313-93; RCW 51.52.140. The process for

Weaver's first claim and his second claim would have been identical—he would have had an opportunity in both cases to the same review before the Department, with the same right of appeal to the Board and to higher courts. RCW 51.52.050, .060, .100, .104, .106, .110, .115, .140. Unlike *Hadley*, there would be no change in the process afforded Weaver, so his ability to litigate his claims would not change.

Given that the issues are identical and he shows no injustice because the cases involve the same substance and procedure, the trial court properly decided that the previous final decision precluded Weaver from re-raising the same issues.

D. Res Judicata Bars Weaver's Appeal Because the Same Parties Have Already Litigated the Same Cause of Action

The doctrine of res judicata also bars Weaver's claim. Res judicata applies where the later action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons involved in the adjudications. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818(2011).

Each element of res judicata applies here. This action involves (1) the same subject matter (whether exposure to sun in firefighting caused malignant melanoma) and (2) the same cause of action (allowance of workers' compensation benefits for the same melanoma as the previous

litigation). And it involves (3) the same parties (Weaver, the City, and the Department) (4) acting in the same quality or capacity (Weaver as the claimant, the City as the employer, and the Department as the agency administering the Industrial Insurance Act).

Weaver disputes only whether his current claim and previous claim were the same subject matter or same cause of action. AB 2, 20. Both claims involve the same subject matter and cause of action.

1. The subject matter is identical: whether work-related sun exposure caused melanoma, making the cancer an occupational disease

It is the same subject matter: whether exposure to sun when firefighting caused the cancer, making the cancer an occupational disease under the Industrial Insurance Act. Weaver argues that the cancer that has since spread was an occupational disease caused by his work. To prove this, he would need to present the same evidence about his work history (testimony about sun exposure at work) and the same medical opinions (testimony about medical causation that links the sun exposure to the cancer) in both the first case and the second case. And he would argue the same right: entitlement to benefits because of an occupational disease. This is the same subject matter.

2. The cause of action is the same: the second action's prosecution would impair the first ruling, and the same

evidence, right, and transactional nucleus of facts are involved: Weaver links firefighting to his cancer

The two causes of action are the same. Courts consider these factors in determining whether the same cause of action is involved:

1. Whether the second action's prosecution would destroy or impair the rights or interests established in the prior judgment;
2. Whether the two actions substantially present the same evidence;
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 Wn.2d 706, 713, 934 P.2d 1179 (1997).

The *Hayes* criteria show that both cases have the same cause of action. (1) Allowing the second cause of action to proceed would destroy or impair rights established in the first Board cause of action because it could reverse the previous claim denial, which is final. (2) Both matters rely on the same evidence about whether sun exposure at work caused the cancer. (3) The second cause of action would infringe on the same right because they are both workers' compensation allowance cases. (4) And the claims arise out the same nucleus of facts—firefighting for the City. These criteria demonstrate that Weaver's current and previous cases are the same cause of action because the allowance of a workers' compensation claim for the same melanoma is at issue in both cases.

Because both applications to open a workers' compensation claim stem from the same facts (exposure to sun while working during the same period), the subject matter and cause of action in the two cases were the same. So res judicata applies to bar re-litigation of the second claim for benefits.

3. Applying res judicata is fair because it ensures finality and repose

Applying res judicata here furthers important principles of finality, and, contrary to Weaver's arguments, is fair. AB 23-24. The parties already presented extensive medical testimony on causation. And the Board reached a final decision. Res judicata ensures finality of decisions and avoids piecemeal litigation. *Spokane Cty. v. Miotke*, 158 Wn. App. 62, 69, 240 P.3d 811 (2010); *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). "It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949) (citation omitted). After the previous case, all understood there was a final determination that Weaver's occupation did not cause his melanoma. Under res judicata, a party cannot "[r]esurrect[] the same claim in a subsequent action." *City of Arlington v. Cent. Puget Sound Growth Mgmt.*

Hearings Bd., 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008). He seeks to do that here.

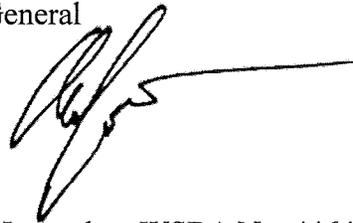
But the City, the Department, and Weaver are bound by the earlier determination that Weaver's melanoma did not arise naturally and proximately out of his employment as a firefighter. That cannot be re-litigated now, as Weaver seeks to do. This Court should maintain the finality of the prior decision by affirming the Department's order rejecting Weaver's new claim.

VI. CONCLUSION

The Board decided that Weaver's malignant melanoma was not an occupational disease; he does not get the opportunity to re-litigate this decision. This Court should affirm rejection of his new claim for benefits.

RESPECTFULLY SUBMITTED this 6th day of September, 2017.

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NO. 76324-5-I

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

MICHAEL WEAVER,

Appellant,

v.

CITY OF EVERETT and
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondents.

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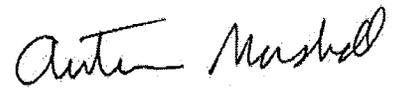
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