



The abolition of final claim denials in Washington workers' compensation?

By Anna M. McFaul ■ August 3 2018

In what is clearly an unfortunate circumstance regarding a worker's later diagnosis of brain cancer, the Washington Court of Appeals ruled that the common law application of *res judicata* and collateral estoppel do not bar a worker from filing a new claim despite prior denial of the same claim. This ruling potentially undermines the finality of denials and closure orders as well as settlement agreements.

The worker originally filed an application for benefits in 2011 contending that his work as a firefighter resulted in melanoma cancer on his shoulder. He underwent surgery and missed five weeks of work. The Department denied the claim for benefits. The worker appealed to the Board, which affirmed the Department's denial of the claim, and the worker filed a pro se appeal to Superior Court and ultimately entered into an agreement and dismissed his appeal in late 2013. This resulted in the claim for melanoma cancer related to the firefighter job being denied.

In 2014, a brain tumor metastasized (spread out) from the melanoma on the worker's shoulder found in 2011. The worker underwent surgery, was unable to return to work, and had low survival chances. The worker filed a second application for benefits contending the melanoma cancer was related to his firefighting job. The Department and the employer contended the second application for benefits was barred by the legal theories of collateral estoppel and *res judicata*. They argued that this repeat application for benefits should be denied as the issue had already been litigated and the melanoma cancer had been determined to not be related to his employment.

In *Michael Weaver v. City of Everett and Department of Labor and Industries*,¹ the Court of Appeals reversed the Department, stating that the common law principles of *res judicata* and collateral estoppel do not apply in this case. The doctrine of *res judicata* prevents repeat litigation of the same claim where a subsequent claim involved the same parties and the same subject matter or issue that were litigated or could have been litigated in the prior action. Similarly to the *res judicata* doctrine, the theory of collateral estoppel is used to promote judicial economy, to avoid repeat litigation of the same issues, to afford finality to judicial determinations and to prevent harassment and inconvenience to parties.

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The Court ruled that the application of these doctrines did not apply and would work an injustice against the worker as the Court was convinced he did not have a chance to fully litigate all of the current issues in the prior litigation. The Court stated the prior litigation only encompassed minor treatment and missing a few weeks of work that were not sufficient economic losses for the worker to fully pursue his claim. The Court noted the worker did not know he would later have brain cancer that would leave him with extensive medical expenses, permanently unable to work and with a low chance of survival. As a result, he allegedly did not fully litigate these issues previously and an injustice would result if he were not allowed to litigate the issues in his second application.

The Court gave the worker a second bite at the apple despite the worker entering into a legally binding prior agreement and order that his melanoma cancer was not job related. The Court was concerned that an injustice would result if collateral estoppel applied and the worker was not given another chance to litigate this matter when the stakes were higher. The Court failed to see that the worker had already had a full opportunity to contest denial of the claim and pursue allowance not only at the Department, but also at the Board appeal hearing, then again before the Board with a Petition for Review, and then again at Superior Court.

This decision is a published decision, meaning it will have precedential value for cases that come after it. If the *Weaver* case remains law, it will allow claims that had previously been denied to be refiled if the worker contends they are seeking a different or more substantial benefit than with the prior application. It will be unclear whether Department orders regarding causation and entitlement to benefits are ever final and binding. It is likely this decision will be appealed to the Washington Supreme Court given its highly controversial outcome.

The attorneys at Reinisch Wilson and Weier have decades of experience in highly complicated workers' compensation matters. Contact our office for assistance in navigating these difficult claims. ■

¹ *Michael Weaver v. City of Everett and Department of Labor and Industries*, Dckt. No. 76324-5-1 (Wash. Ct. App. Div. 1, July 16, 2018).

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