**COMMONWEALTH OF MASSACHUSETTS**

| | |
|---|---|
| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 66691-92 34778-93 23934-94** |
| Arthur Stevens | Employee |
| City of Brockton | Employer |
| City of Brockton | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Wilson, McCarthy & Smith)

**APPEARANCES**
John K. Ford, Esq., for the employee
Michael K. Landman, Esq., for the self-insurer

**WILSON, J.** The employee appeals from a decision that denied his claim for § 34A permanent and total incapacity benefits as well as §§ 13 and 30 medical benefits. He contends that the administrative judge did not consider the employee's medical evidence and that the judge's decision fails to apply the doctrine of res judicata to those issues previously decided in this matter. As there is merit in both arguments, we vacate the decision and recommit the case for further findings of fact.

The employee, seventy-six years old at the hearing, is a high school graduate with additional electrical schooling at Franklin Technical Institute. In 1950, he began his career as a pneumatic control installer. He last worked from 1977 to September 1993 as a pneumatic control technician for the City of Brockton. This job involved much climbing, squatting, crawling and walking, and he carried a thirty five-pound toolbox. (Dec. 95.)

Mr. Stevens suffered numerous work-related knee injuries. On December 7, 1983, he tore cartilage in his right knee. This led to surgery in April 1984, followed by seven weeks of lost work. He subsequently returned to his regular job without restriction. Over the next decade he suffered numerous knee twists, more often to the left knee, but continued to work uninterrupted until August 11, 1992, when he struck his right knee after losing his footing on a slippery floor. He remained out of work for three days, and

then returned to work without restriction, although both his right and left knees were still painful. On September 24, 1993, the employee left work for the last time due to severe bilateral knee pain. He did not suffer a specific incident that day. He underwent total left knee replacement in October 1993. Mr. Stevens had a good recovery, although the left knee gives way on occasion and he cannot squat, work around the house, mow the lawn or shovel snow, and he must use a cane. (Dec. 95-96.)

The employee brought a claim for benefits which was the subject of a § 11 hearing. The administrative judge who issued the initial decision on that claim found both the right and left knee injuries, as well as the left and right knee replacements, causally related to the employee's work for the City of Brockton. (Dec. 96; Exhibit 4, pp.7-8.) He also found that the surgery to the right knee probably tended to speed the development of degenerative arthritis. (Exhibit 4, p.8.)

The employee subsequently brought a claim for § 34A permanent and total incapacity benefits. Following the § 10A conference, a new administrative judge[1] ordered the self-insurer to pay those benefits. The self-insurer appealed that order giving rise to a hearing de novo.

Pursuant to § 11A, the employee was examined by Dr. Vincent Genovese. Dr. Genovese's report and subsequent deposition were entered into evidence. Because the judge found the causal relationship issue to be complex and because of his "lack of confidence in the impartial examiner's opinions[,]" (Dec. 98), the parties were permitted to submit additional medical evidence. The employee asserts that he submitted the August 23, 1996 report of Dr. John Doherty and the self-insurer submitted the December 2, 1997 report of Dr. Edwin T. Wyman, Jr.[2] (Employee brief 3; Dec. 98.) Relying on

---

[1] The administrative judge who issued the first decision no longer served in that capacity when the current claim arose. See G.L.c. 152, § 10A(1) ("Except where events beyond the control of the department make such scheduling impracticable, the administrative judge assigned to any case . . . shall retain exclusive jurisdiction over the matter and any subsequent claim or complaint shall be referred to the same administrative judge.").

[2] The decision lists the December 2, 1997 report of Dr. Edwin T. Wyman, Jr. as Exhibit 5. Although the file contains a December 17, 1997 letter from employee counsel to the hearing judge stating that he does not object to the submission of the November 28, 1997 report of Dr. Wyman, we are unable to locate that report or any December 2, 1997 report in the board file.

the opinions of Drs. Genovese and Wyman, the judge concluded that both the knee surgeries and the present knee problems are related to the employee's disabling arthritis condition and he denied the employee's claim.

The employee first points out that the decision neither considers nor reflects the report of Dr. Doherty, the employee's expert. The self-insurer concedes this point, stating that the report was entered into evidence by agreement of the parties. (Self - insurer's brief 2.) Among the numbered hearing exhibits in the board file is the August 23, 1996 report of Dr. John Doherty. It is labeled "X5." Dr. Doherty's report, however, neither is listed in the decision as an exhibit nor are its contents discussed.

Section 11B of the Act mandates that a decision of an administrative judge "set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." Gorrell v. Town of West Boylston, 8 Mass. Workers' Comp. Rep. 78, 79 (1994). The reviewing board is unable to perform its appellate function without findings on all issues raised by the parties. See Crawford's Case, 340 Mass. 719, 721 (1960); Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). To this end, a judge's decision must clearly identify "all documents offered by the parties, marked as exhibits and considered by him in reaching his conclusions." Warnke, id., citing Rossi v. Massachusetts Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101, 102 (1993). It is axiomatic that the judge must weigh and consider all properly admitted evidence. There is no indication in the decision that Dr. Doherty's report was made a part of the hearing record and considered by the judge as he worked toward his decision.

The employee next asserts that the hearing judge erred in failing to apply the doctrine of res judicata to the causal relationship between the industrial injuries and the disabling bilateral knee conditions already decided in the employee's favor.[3] He is correct.

[3] We point out that a distinction should be made between res judicata or claim preclusion and collateral estoppal or issue preclusion. In this case, the appropriate designation is collateral estoppal or issue preclusion. See Heredia v. Simmons Co., 10 Mass. Workers' Comp. Rep. 490, 491 n.1 (1996).

On April 25, 1995, another administrative judge issued a prior decision finding the employee's right and left knee conditions, as well as both subsequent operations causally related to his industrial accidents. (Dec. 1; Exhibit 4.) The second administrative judge is bound by that earlier decision as to the issues it decided. See Martin v. Ring, 401 Mass. 59, 61 (1987); Franklin v. North Weymouth Cooperative Bank, 283 Mass. 275, 280 (1933). Nevertheless, the principle of issue preclusion operates only as a bar to relitigation of issues and rights already settled between the parties. Burrill v. Litton Industries, 11 Mass. Workers' Comp. Rep. 77, 79 (1997). Present incapacity and its causal relationship, which often vary over time, are not subject to the doctrine of issue preclusion, as they are issues distinct from those already decided in an original liability case. As such, they are not barred from adjudication by the prior decision. Id. On recommital, as the judge revisits his findings on present incapacity and its causal relationship, he may not, however, contradict or override those original liability issues as to the knee injuries, surgeries and subsequent right knee arthritis already decided by the previous judge.[4]

We vacate the decision of the administrative judge and recommit the case for clarification of the status of the reports of Dr. Doherty and Dr. Wyman and for additional findings in accordance with this decision. Pending issuance of the new decision, the March 13, 1997 conference order awarding continuing § 34A benefits is reinstated.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: May 20, 1999

[4] The earlier decision contained a finding that surgery to the right knee probably tended to speed the development of degenerative arthritis in the right knee. This finding cannot be disturbed. The old principle that acceleration of a pre-existing disease or infirmity to the point of disablement is as much a personal injury as if the work had been the sole cause has application here. See Donlan's Case, 317 Mass. 291, 294 (1944); L. Locke, Workmen's Compensation § 173 (2d ed. 1981).

William A. McCarthy
Administrative Law Judge

Suzanne E.K. Smith
Administrative Law Judge