COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 042099-04

Cheryl Lopes	Employee
Lifestream, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Michael J. Sherry, Esq., for the insurer

HORAN, J. The employee appeals from a decision[1] denying her claim for further weekly incapacity benefits.[2] For the reasons that follow, we reverse the decision and recommit the case for further findings of fact.

The facts pertinent to the issue raised on appeal are as follow. In the first hearing decision, the judge found the employee's July 28, 2004, motor vehicle accident was work-related.[3] (Dec. I, 6.) In his findings of fact, the judge expressly credited the employee's testimony that she sustained a "whiplash type

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[1] This decision was filed on September 24, 2009, we refer to it as Dec. II; a prior hearing decision by the same judge was filed on May 8, 2006, we refer to it as Dec. I.

[2] The first hearing decision awarded the employee closed periods of § 34 and § 35 incapacity benefits through September 22, 2005. Rejecting the employee's challenges to the evidentiary bases for termination of those benefits, we summarily affirmed that decision in Lopes v. Lifestream, Inc., 21 Mass. Workers' Comp. Rep. 213 (2007).

[3] The board file reflects that the Employee's Claim form 110 dated 4/13/05 sought benefits "from 7/28/04 to date & continuing" for injuries described as "[n]eck & back." The insurer's hearing memorandum indicates that it denied liability, citing the "[g]oing and [c]oming [r]ule." (Dec. I, Ex. 4.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

injury" in the accident. (Dec. I, 5.) He also found that, following the accident, the employee was provided with a neck brace in the emergency room at a local hospital, and that she treated with a chiropractor for neck and back pain. (Dec. I, 7.) The employee returned to work, only to leave on December 22, 2004, when her back symptoms increased. Id. She made a brief attempt to return to light duty work, but left once again due to her back symptoms. (Dec. I, 8.)

Dr. Olarewaju J. Oladipo, the § 11A impartial medical examiner who examined the employee nearly fourteen months after her automobile accident, causally related her lumbar strain/sprain to work. (Dec. I, Ex. 1.) With respect to her complaints of neck pain, Dr. Oladipo related that, owing to the accident, the employee "suffered a less severe pain in the neck." He also noted that "[r]esolution of [her] neck symptoms was reported." Id. On the date of Dr. Oladipo's physical examination of the employee, she complained of "persistent pain in the lower back." Id. Dr. Oladipo opined the employee was partially disabled from work, and "has reached maximum improvement in terms of the treatment of the primary diagnosis of lumbar sprain/strain." (Dec. I, Ex. 1.)

The judge adopted the opinion of Dr. Oladipo on the issues of "diagnosis, causation and the employee's physical limitations," and awarded her closed periods of total and partial disability owing to her work-related lumbar injury. (Dec. I, 9-11.) The judge also ordered the insurer to pay "reasonable and related medical expenses . . . for the diagnosed strain/sprain injury to the employee's lumbar spine." (Dec. I, 11.) The judge's summary order of benefits did not address the employee's neck injury. (Dec. I, 11-12.)

At the second hearing, the employee claimed: 1) further incapacity benefits stemming from her lumbar spine injury; 2) incapacity benefits due to her neck injury; and 3) a psychiatric injury. (Dec. II, 1-2.) The judge denied the employee's incapacity claims, and also rejected her psychiatric claim.[4]

[4] On appeal, the employee does not challenge the judge's denial of her psychiatric claim or his denial of her incapacity claim relative to her lumbar injury.

Specifically, the judge found the employee's neck injury claim was barred by the doctrine of res judicata. (Dec. II, 18-20.)

The employee's appeal presents one issue. She argues the judge erred by rejecting her neck incapacity claim on res judicata grounds. We agree.

Given the judge's factual findings in the first hearing decision, the principle of issue preclusion[5] does not bar the employee from litigating her claim for incapacity benefits owing to her neck condition.[6] In his first decision, the judge expressly credited the employee's testimony, and found that she suffered and treated for neck pain following her industrial accident. In his second decision, the judge wrote: "[m]y original Decision found only a 'lumbar sprain/strain injury causally-related to her workplace activities' for which I ordered medical benefits," and "not. . . a causally-related injury to her cervical spine; I did not order medical benefits for that body part." (Dec. II, 19.) Referring to this board's decision in

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[5] The phrase "res judicata," as employed by the judge below, "has been replaced, in most cases, by the more precise phrase, 'issue preclusion.' " Almeida v. Travelers Insurance Co., 383 Mass. 226, n.1 (1981). "The general rule of issue preclusion provides that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" Restatement (Second) of Judgments Section 27 (1982). Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372 (1985).

[6] The employee's claim for benefits for her neck injury was properly filed after the filing date of the first hearing decision. In light of the state of the evidence at the first hearing, and the absence of a finding of a causally related neck disability/incapacity in the first hearing decision, at the second hearing the employee was required to produce evidence of an incapacity owing to her neck condition, relative to her work-related automobile accident, in order to maintain a subsequent claim for incapacity benefits for that injury. Dr. Oladipo, who conducted a second § 11A examination of the employee on August 14, 2007, provided that medical evidence. (Dec. II, Exs. 1, 7.) The judge adopted his opinion that the employee continued to suffer from a lumbar injury causally related to her work injury of July 28, 2004, but the judge, ostensibly on res judicata grounds, did not address the doctor's opinion that the employee's neck symptoms also contributed to her remaining partially disability from her work as a direct care patient provider. (Dec. II, 9-10.)

Lopes, supra, the judge concluded the employee "could not raise a subsequent claim for injury to her cervical spine, a matter having been adjudged."[7] Id.

Looking at his first decision objectively as we, and the parties, must, the judge's characterization of it is only partially correct. True, he did not order medical benefits for a cervical spine injury. However, his findings of fact in the first decision reveal that he *did* find the employee injured her neck in the work-related accident.[8] Thus, the judge's conclusion in his second decision, under the heading, "Res Judicata," that he did not find a causally-related injury to the employee's neck in the first decision is error, as the judge's subsidiary findings in that decision establish that fact, notwithstanding the absence of an order for benefits. A "personal injury" under c. 152 "do[es] not require incapacity for labor, or the anticipation of such incapacity, in order to constitute an injury," Crowley's Case, 287 Mass. 367, 374 (1934), but only "a lesion directly traceable to a happening in the employment and arising out of it." Perangelo's Case, 277 Mass. 59, 64 (1931); cf. Ames v. Town of Plymouth, 19 Mass. Workers' Comp. Rep. 150, 155-156 & n.5 (2005)(finding of personal injury under c. 152, absent incapacity, must still be supported by evidence of identifiable lesion).

Nor can we assume anything from the judge's order of § 30 medical benefits for the treatment of the employee's lumbar spine. As the judge found, the emergency room staff treated the employee's neck at the same time as her back.

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[7] In his second hearing decision, the judge placed too much reliance upon the absence of a specific benefit order for the neck injury in the first hearing decision. Such an order is not a prerequisite for a finding that an injury occurred. In any case, based on the medical evidence of record in the first hearing, and the employee's testimony, the judge could not have found any incapacity attributable to employee's neck injury at that time. The employee's concession to Dr. Olidapo that her neck pain had resolved, and thus caused her no disability at that time, did not require her to appeal from the first hearing decision in order to establish that she had injured her neck on July 28, 2004.

[8] Had the judge, in his first decision, discredited the employee's testimony relative to her neck complaints, or expressly found that she had not injured her neck in the accident, a different result would obtain.

He made the same finding respecting the chiropractic care which immediately followed the accident. (Dec. I, 7.)

Therefore, the employee was free to claim, based on evidence developed after the close of the evidence in the first hearing, that she became incapacitated as a result of her work-related neck injury. "[A] new claim or complaint on present incapacity or causal relationship between the original work injury and the present incapacity presents a new and different issue from that of original liability, and as such is not barred from adjudication by the prior judgment." Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997). See also Vetrano v. P. A. Milan Co., 2 Mass. Workers' Comp. Rep. 232, 234-235 (1988); Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406-407 (1994).

In sum, the principles of res judicata, or issue preclusion, do not bar the employee's claim for a work-related neck injury here, because the judge, in his first hearing decision, found that the employee suffered a neck injury as a result of her industrial accident. That issue was not "decided adversely to the party seeking to litigate the subject matter again." New England Home for Deaf Mutes v. Leader Filling Stations Corp., 276 Mass. 153, 157 (1931); compare Suliveres's Case, 78 Mass. App. Ct. 1126 (2011)(Memorandum and Order Pursuant to Rule 1:28)(res judicata barred relitigation of claim for left carpal tunnel syndrome where prior hearing decision explicitly rejected that claim). In fact, the reverse is true: as the insurer did not appeal from the first decision, it cannot now maintain the employee did not injure her neck, at least to some extent, on her date of injury. Of course, the insurer may challenge the employee's pending incapacity claim on other grounds.

Accordingly, we reverse the decision insofar as it denies and dismisses the employee's work-related neck injury claim on res judicata/issue preclusion grounds. We recommit the case for further findings addressing extent of incapacity, if any, related to that injury.

So ordered.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge