COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 037535-10 039240-08**
Clarissa Perez	Employee
Department of Employment and Training	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Levine)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Arthur Jackson, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying and dismissing her claim for weekly incapacity and medical benefits. We affirm.

Entertaining the self-insurer's appeal in Perez v. Dep't of Emp. and Training, 26 Mass. Workers' Comp. Rep. 269 (2012), we affirmed a decision[1] awarding the employee §§ 13 and 30 benefits for four months of medical treatment following her work-related October 15, 2008 cervical strain, but denied her claims based on an alleged May 10, 2005 industrial accident. (Dec. I, 10-11, 12-13.)

In 2012, the employee filed two claims,[2] the first based on the October 15, 2008 injury date, and the second based on a previously unclaimed November 15, 2010 injury date. The employee sought incapacity and medical benefits from

[1] The first hearing took place on January 14, 2011 and March 11, 2011; the record closed on May 6, 2011. The first hearing decision was filed on November 11, 2011; we refer to it as Dec. I. We refer to the decision presently under review as Dec. II.

[2] "The claim in DIA 39240-08, filed on March 30, 2012 was for § 34 benefits from 10/15/2008 to date and continuing. The claim in DIA 37535-10, filed on June 21, 2012, was for § 34 benefits from 11/15/2010 to date and continuing." (Dec. II, 11 n.8.)

dates prior and subsequent to the close of the record at the prior hearing. See footnote 1, supra. The employee also sought medical benefits for treatment of a psychiatric condition. (Dec. II, 2.) All claims were denied at conference, and the employee appealed.

Prior to the hearing, the employee underwent an impartial medical examination by Dr. Charles Kenny. Dr. Kenny's report was entered into evidence, along with his deposition testimony. (Dec. II, 2-3.) The judge authorized the parties to submit additional medical evidence bearing on the employee's claimed psychiatric injury. (Dec. II, 5.) Both parties did so. (Dec. II, 2.)

At the hearing, the self-insurer raised, inter alia, the defenses of liability (for psychiatric injury), causal relationship, disability, and res judicata.[3] (Dec. II, 2.) The self-insurer also argued that the employee, not having been found incapacitated in the prior hearing decision, could not prevail in her incapacity claim without proving a worsening of her work-related medical condition following the close of the record at the first hearing. (Dec. II, 2); See Foley's Case, 358 Mass. 230 (1970).

In his decision, the judge found:

> As I have accepted and adopted Dr. Kenny's opinion that any effect from the November 15, 2010 industrial accident would have lasted approximately 3 months, i.e., until February 15, 2011, a date that is prior to the close of the record in the prior decision, I find that the Employee's claims[] for medical treatment prior to the last day of [the] close of the record therein on May 6, 2011 are barred.

(Dec. II, 13)(emphasis in original; footnote omitted). The judge stated that his analysis also applied to the 2008 injury date. (Dec. II, 13 n.10.) He rejected the employee's complaints regarding her limitations, and flatly declared, "[a]ll in all, I

[3] The defense of "[r]es judicata is comprised of two doctrines – 'claim preclusion' and 'issue preclusion.'" Morgan v. Evans, 39 Mass. App. Ct. 465, 467, (1995) citing Heacock v. Heacock, 402 Mass. 21, 23, n.2 (1988).

find that the Employee's testimony is not credible." (Dec. II, 12.) He concluded she had failed to prove, by a preponderance of the evidence, further entitlement to benefits under either injury date.[4] (Dec. II, 13.) Accordingly, he denied and dismissed the employee's claims. On appeal, the employee raises several issues.

We first address the employee's argument that the judge erred by precluding consideration of her alleged November 15, 2010 injury. We disagree. The doctrine of claim preclusion applies to workers' compensation proceedings. See Martin v. Ring, 401 Mass. 59, 61-63 (1987)(issue preclusion). Policy considerations underlying the rule against splitting a cause of action are at the foundation of this doctrine. Heacock, supra, at 23-24. Claim preclusion "prevents relitigation of all matters that were or could have been adjudicated" in a prior claim. Blanchette v. School Comm. of Westwood, 427 Mass. 176, 179 n.3 (1998). In support of her claim for benefits at the first hearing, the employee introduced into evidence an exhibit referencing her November 15, 2010 emergency room visit, including a radiograph of her spine. (Dec. I, Ex. 6.) The employee advances no argument to excuse her failure to prosecute that injury date at the prior hearing. Because the employee claimed that her cervical condition was worsened by her alleged November 15, 2010 injury, we conclude she had the incentive and the opportunity to advance that claim at the prior hearing in 2011. See footnote 1, supra. Her failure to pursue that claim, under these circumstances, is without justification.

The employee's remaining claims of error fail because, even if correct, they do not overcome the effect of the judge's rejection of her testimony respecting a worsening of her cervical condition after the date the record closed at the first hearing. See Foley, supra.

[4] Adopting the opinion of Dr. Michael Rater, the judge found the employee's psychiatric condition was not causally related to her claimed work injuries. (Dec. II, 10.) The employee does not challenge this finding on appeal.

Finally, contrary to what the employee maintains, the judge did not find her incapacitated from work for any period of time. Therefore, her reliance on Vallee's Case, 72 Mass. App. Ct. 1117 (2008)(Memorandum and Order Pursuant to Rule 1:28), is entirely misplaced.

We affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **August 20, 2015**