COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019050-04**

David J. LaRoche	Employee
G&F Industries, Inc.	Employer
Atlantic Charter Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Charles E. Berg, Esq., for the employee at oral argument
Linda T. Manning, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision holding that principles of res judicata bar him from litigating his claim for medical treatment for an alleged back injury. We affirm the decision.

The employee slipped and fell at work on June 26, 2004. He filed a claim for a left knee injury, and was awarded weekly incapacity and medical benefits in a March 9, 2007, hearing decision.[1] The decision contained no discussion or findings regarding any alleged back injury. (Dec. I; Dec. II, 2.) The employee appealed, alleging error in the assignment of an earning capacity. We affirmed that decision.[2]

---

[1] The March 9, 2007, hearing decision is hereinafter referred to as "Dec. I." The November 4, 2011, hearing decision, which is the subject of the employee's current appeal, is referred to as "Dec. II."

[2] We take judicial notice of documents in the board file, as did the judge, who took notice of the board file from the first hearing. (Tr. 16.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

The employee subsequently underwent a total knee replacement. (Dec. II, 4.) On June 30, 2008, he entered into a lump sum settlement agreement redeeming liability for his knee sprain/strain, but expressly disavowing liability for knee replacement surgery.[3] (Dec. II, 2.)

The following year, the employee filed a claim for § 30 benefits, alleging a low back injury with the same June 26, 2004, date of injury as the knee injury. (Employee's claim, September 11, 2009.) Following a § 10A conference, a different administrative judge denied the claim on res judicata grounds, and the employee appealed to an evidentiary hearing. An impartial examination was again conducted by Dr. Alan Bullock, the § 11A physician from the first hearing.

The judge bifurcated the hearing to first determine whether principles of res judicata barred the new claim. (Dec. II, 2.) No testimony was taken. The parties only presented arguments and submitted briefs. (Dec. II, 2, 3; Ex. A, Ins. Hearing br.; and Ex. B, Employee's Memorandum of Law.)

On appeal, the employee contends the judge erred in finding that the claim for medical treatment for his back was precluded by principles of res judicata. The employee argues that res judicata does not apply because there was no adverse final decision on liability for the back since that issue was not tried by consent at the first hearing, and was not addressed in the first decision. Further, the employee asserts the decision on appeal was speculative insofar as it indicated he had the incentive to litigate the back claim, because the record of the first hearing does not indicate that there was a compensable, causally related back

[3] The June 30, 2008, lump sum agreement was entered as an exhibit at oral argument before us because it had been inadvertently omitted from the board file. (11/1/12 Tr. of Oral Argument.) The agreement indicated that the injury for which liability was redeemed was a "*right* knee sprain/strain" though the employee had litigated and had been awarded compensation for a *left* knee injury at the first hearing. Neither the parties nor the judge discuss this inconsistency. The lump sum agreement also indicated that liability for a psychiatric claim with the same date of injury, for which medical benefits had been ordered at a § 10A conference, (see Dec. II, 2), was not accepted. ("Agreement for Redeeming Liability by Lump Sum," June 30, 2008.)

injury or medical bills. Finally, the employee argues the decision violated the employee's due process rights because the employee was not allowed to testify as to why he did not claim medical benefits for his back at the first hearing. Though we disagree with the judge's reasoning, we hold that he reached the correct result, and affirm the decision.[4]

"Res judicata is the generic term for various doctrines by which a judgment in one action has a binding effect in another. It comprises 'claim preclusion' and 'issue preclusion.' " Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). "Issue preclusion" requires that an issue of fact or law actually be litigated and determined by final judgment in order for such determination to be conclusive in a subsequent action between the parties, on the same or a different claim. Martin v. Ring, 401 Mass. 59, 60-61 (1987). "Claim preclusion," however,

> makes a valid, final judgment conclusive on the parties and their privies and bars further litigation of all matters that were *or should have been adjudicated* in the [prior] action. See Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 279-280 (1933), and cases cited. This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. The doctrine is a ramification of the policy considerations that underlie the *rule against splitting a cause of action*, and is "based on the idea that the party to be precluded has had the *incentive and opportunity to litigate the matter fully* in the first lawsuit. As such, it applies only where both actions were based on the same claim.

[4] The employee at hearing maintained his back injury was caused directly by the 2004 fall. (Tr. 4-5; Dec. II, 3.) At oral argument before this board, he took the position that his back claim was derivative of his knee. (Tr. of Oral Argument, 3-4, 7, 11.) We do not consider this argument. The employee may not pursue one theory of liability at hearing and a new and different theory on appeal. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections and arguments not raised below are waived on appeal); Ferry v. Rosewood Const. Corp., 76 Mass. App. Ct. 1107 (2010)(Memorandum and Order Pursuant to Rule 1:28)(where employer did not argue theory at trial, he waived it on appeal).

Heacock, supra at 23-24 (emphases added); see also Hough v. Athol Table, LLC, 25 Mass. Workers' Comp. Rep. 301 (2011), *aff'd sub nom*. Hough's Case, 82 Mass. App. Ct. 1121 (2012)(Memorandum and Order Pursuant to Rule 1:28).

There is no merit to the employee's argument that liability for his alleged back injury must have been litigated and determined at the prior hearing for that hearing decision to have preclusive effect.[5] Where the parties are the same, and the prior judgment is final,[6] the only issue is whether the employee's claim for a back injury was raised *or should have been raised* at the first hearing. See Bagley v. Moxley, 407 Mass. 633, 637 (1990)(only issue whether adverse possession claim was raised or should have been raised in prior litigation to establish ownership of parcel of land).[7]

Despite his assertion to the contrary, the employee had both the incentive and opportunity to raise liability for his back injury at the prior hearing, which he ultimately did. The employee's motion to submit additional medical evidence

---

[5] Our decision in Suliveres v. Durham School Serv., 24 Mass. Workers' Comp. Rep. 49 (2010), *aff'd sub nom*. Suliveres's Case, 78 Mass. App. Ct. 1126 (2011)(Memorandum and Order Pursuant to Rule 1:28), cited by the employee, holds only that where the employee did not allege a carpal tunnel injury, but it was nonetheless tried by consent, the doctrine of res judicata bars relitigation of the employee's claim for carpal tunnel injury. Suliveres does not require litigation of an issue for claim preclusion to apply.

[6] See Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 252 (1999), and cases cited (unappealed hearing decision a final judgment). Here, the decision was appealed to the reviewing board on vocational issues and affirmed.

[7] Despite the judge's statement that the prior judge "was not required to specify the full and complete nature of . . . all injures resulting from the industrial accident" in the first hearing, (Dec. II, 4), the employee was bound to put forward all theories of liability existing at the time of his original claim. See Bagley's Case, supra at 638; Heacock, supra at 23; Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. 153 (2011), *aff'd sub nom.*, Boyden's Case, 81 Mass. App. Ct. 1117 (2011)(Memorandum and Order Pursuant to Rule 1:28), *rev. denied,* 462 Mass. 1102 (2012). He did not, and therefore he is barred from doing so now.

specifically alleged a low back injury as well as a knee injury.[8] Medical evidence admitted in evidence after allowance of the employee's motion indicates the onset of a low back injury at the same time as the knee injury, and even calculates a corresponding loss of function. (See admitted reports of Dr. Roland Caron.) The first § 11A impartial report reflects a history of a back injury in 2004, and the employee testified that he had back-related complaints.[9] (See 2/28/06 Tr. 60; 3/30/06 Tr. 13.) Cf. O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259 (1998)(claim preclusion does not apply where plaintiff did not have the opportunity to raise claim at earlier proceeding because that case was decided prior to effective date of statute on which he relied in second claim).[10]

We reject the employee's contention that his due process rights were violated because he was not allowed to testify as to the reasons for not bringing a claim for medical treatment for the back at the first hearing. He does not allege he objected below to the bifurcation of the hearing to decide the issue of res judicata, and therefore that issue is waived. See Green, supra at 128. In any case, the record below is sufficient for us to determine that claim preclusion applies here.

---

[8] That motion stated: "The Employee sustained injuries to his left knee and low back in an accident in the course of his employment on June 26, 2004."

(Dec. I, Ex. 5; Ins. br. Ex. 1).

[9] This case is distinguishable from those where liability has been established by hearing decision for an injury, and the issue later arises as to whether specific medical bills are causally related to that injury. See Lee v. Lynn Plastics Corp., 13 Mass. Workers' Comp. Rep. 105, 107 (1999)(*issue* preclusion did not apply to bar litigation of whether coronary artery bypass surgery was causally related to the work-related myocardial infarction). Here, liability was established only for a knee injury. The employee now claims medical bills for a back injury occurring at the same time.

[10] Certainly, there are many cases where an employee has a physical injury, and *later* develops psychological, or other, problems as a result. In those cases, the employee may not be precluded from bringing a derivative claim after the original injury has been litigated. See, e.g., Howe v. Ken Weld Co., Inc., 25 Mass. Workers' Comp. Rep. 201 (2011). That is not the case here.

The decision is affirmed.

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **March 12, 2013**