COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007656-02**

Jean McCarthy	Employee
Peabody Properties, Inc.	Employer
United States Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

The case was heard by Administrative Judge Preston.

APPEARANCES
Ronald St. Pierre, Esq., for the employee
Byron G. Mousmoules, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from the third hearing decision in this case, which awarded § 34A permanent and total incapacity benefits from the date of the close of evidence of the first hearing. The insurer argues that, because the employee failed to appeal a reviewing board decision reversing the award of § 34A benefits made in the second hearing decision, she is barred by principles of res judicata from bringing a further § 34A claim.[1] We disagree, and affirm the decision.

In the decision on appeal, the judge found the following facts. On January 7, 2002, the employee fell and injured her right knee in the course of her employment as a construction supervisor. On March 8, 2002, she underwent arthroscopic surgery to repair the torn medial meniscus in her right knee. During the surgery, she suffered permanent throat damage as a result of intubation. Because the first knee surgery was unsuccessful, the employee underwent a second procedure in June 2003. During the second surgery,

[1] There have been two prior hearing decisions awarding § 34A benefits, each of which was appealed, resulting in two prior reviewing board decisions. McCarthy v. Peabody Props., 24 Mass. Workers' Comp. Rep. 89 (2010)("McCarthy I"); and McCarthy v. Peabody Props., 26 Mass. Workers' Comp. Rep. 1 (2012)("McCarthy II"). The hearing decision filed on March 26, 2008 will be referred to as "Dec. I"; the decision filed October 22, 2010, as "Dec. II"; and the decision on appeal here, filed September 27, 2013, as "Dec. III."

the spinal anesthesia was improperly administered, causing permanent nerve damage which resulted in continuing *left* leg numbness and pain. Following the second surgery, the employee continued to have significant right knee pain. On September 8, 2010, she underwent a total right knee replacement. (Dec. III, 5.)

The insurer accepted liability for the employee's right knee injury, paying benefits off and on, until the employee filed a claim for § 36 benefits, to which she added a § 34A claim and a claim for psychiatric sequela.[2] (Dec. 1, 3; Dec. III, 4, 13.) At the first hearing on December 29, 2007, the parties stipulated to the acceptance of liability for the right knee injury. McCarthy I, supra, at 91. The insurer raised the affirmative defense of § 1(7A) for the period subsequent to the claim.[3] (Dec. I, 3.) See Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep. 315, 317 (2011)(insurer may raise § 1[7A] for first time after acceptance of liability and payment of benefits).

In his decision of March 26, 2008, the judge found that the factual predicates for the application of § 1(7A) had not been met, and awarded ongoing § 34A benefits from the date claimed, October 10, 2007, as well as §§ 13 and 30 benefits for treatment for the right leg, left leg and emotional injuries, and § 36 benefits in the amount of $34,805.60. (Dec. I, 10.) We reversed and recommitted, holding that the insurer had met its burden of producing evidence of a pre-existing condition (osteoarthritis) which combined with the

[2] Nowhere in the three hearing decisions is there a statement of the duration and type of benefits the employee received. The employee's brief states she "received various periods of § 34 benefits between surgery and work attempts." (Employee br. 2.) The board file reveals a March 20, 2002, notification of payment of § 34 benefits, and a September 1, 2005 conference order to pay § 35 benefits beginning on October 15, 2005. The employee appealed, but withdrew the appeal; the insurer did not appeal. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file).

[3] General Laws c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

employee's industrial injury, thus requiring further analysis regarding the application of § 1(7A). McCarthy I, supra, at 94.

Without taking additional evidence, the judge issued a second hearing decision addressing § 1(7A). He found that, on December 12, 2001, several weeks before the accepted January 7, 2002 injury, the employee suffered a work-related injury to her right knee, which had not previously been discussed. Further, he found that osteoarthritis did not exist in her right knee prior to the 2001 injury, and that, if any arthritis existed prior to January 7, 2002, it was "grossly insignificant." (Dec. II, 1-2.) He concluded that:

> Only after the March 2002 surgery did the osteoarthritis gain traction and become a factor in the future care and treatment of the Employee's right knee. Thus, Section 1(7A) ceases to be in play as an affirmative defense because the right knee osteoarthritis is a compensable work related condition arising after the right knee injury of December 12, 2001.

(Dec. II, 3.) See Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001)(where pre-existing condition retains connection to earlier compensable injury, condition cannot be characterized as "not compensable" under this chapter," thus obviating need for § 1[7A] analysis).

The insurer appealed, and the reviewing board reversed the second hearing decision, without recommitting, holding that:

> 1) no medical evidence supports the judge's conclusion that the employee's pre-existing osteoarthritis was due to a compensable workplace injury on December 12, 2001, and 2) there is no medical evidence in the record from which it could be found that the January 7, 2002 work injury remained a major cause of the employee's disability . . . .

McCarthy II, supra, at 4. We then noted that the "law of the case" was that "the pre-existing osteoarthritis was aggravated by the January 7, 2002 work injury . . . triggering the application of the 'a major cause' provisions of § 1(7A)." Id. n.4.

The employee did not appeal our decision in McCarthy II. Instead, she filed a new claim for § 34A benefits, which was amended to begin on March 18, 2008, the date the record closed in the first hearing. (Dec. III, 3.) At hearing, the insurer filed a motion to dismiss on res judicata grounds. After that was denied, (Dec. III, 2, Ex. D for

identification; Tr. 94-96), it raised res judicata as an issue, along with disability and extent thereof, causal relationship, including § 1(7A), and entitlement to §§ 13, 30 and 36 benefits. The insurer did not contest liability. (Dec. III, 3.)

The judge found:

> The Insurer prevailed at the reviewing board [in McCarthy II] on the Employee's failure to properly address the 1(7A) affirmative defense. However, since the Insurer acknowledged responsibility for the January 7, 2002 right knee industrial injury, the Employee was not foreclosed from pursuing Section 34A, 13 and 30 benefits for any subsequent period after March 18, 2008. This present decision addresses the Employee's capacity for work and Section 13 and 30 medical expenses after March 18, 2008.

(Dec. III, 6.) The judge adopted portions of the medical opinions of three physicians who had seen the employee after the close of evidence of the first hearing.[4] Addressing the insurer's § 1(7A) affirmative defense, the judge found the employee met her burden of proof "by establishing that since the close of the previous hearing record March 18, 2008 . . . her January 7, 2002 right knee injury is, and remains a major cause of her disability and need for medical treatment," including the total right knee replacement. (Dec. III, 14, 15.) In addition, the judge found the employee established that her industrial injury was a major cause of "the unfortunate surgical medical mistakes resulting in the now chronic permanent left leg diminished functioning and constant numbness, and the scarring of her throat." (Dec. III, 15.)

The judge found that the throat scarring caused no incapacity, (Dec. III, 7), but the employee's "constant debilitating right leg pain with left leg pain, numbness and reduced

[4] The impartial opinion of Dr. Frank A. Graf, who examined the employee on July 5, 2012 and was deposed on January 21, 2013, is most relevant to the issues here. The judge adopted Dr. Graf's opinion that, despite the lack of symptomatic evidence of pre-existing osteoarthritis, the employee did have pre-existing osteoarthritis in her right knee prior to January 7, 2002; that the workplace event and the surgical trauma initiated a fulminating chondrolysis; that, as a result of the employee's meniscal tears and the inflammation associated with them, an "accelerated deterioration of the knee joint" occurred; and that the January 7, 2002 injury is "the major cause" of her permanent and total disability.(Dec. III, 11-12.) In addition, Dr. James Karlson opined in his July 24, 2013 report that "the major cause of the Employee's continuing disability and need for her right and left knee treatment, including the September 8, 2010 total knee replacement, is the work place right knee injury of January 7, 2002." (Dec. III, 10.)

mobility," prevent her from sustaining any work. (Dec. III, 13-14.) Accordingly, he awarded § 34A benefits from March 18, 2008, and continuing; §§ 13 and 30 medical benefits for treatment of the employee's spine, left leg and throat; and §§ 13 and 30 benefits for treatment of the employee's right knee after March 18, 2008, including the total knee replacement and aftercare.[5] Id. at 16-17.

On appeal, the insurer raises essentially one issue. It argues that principles of res judicata bar the employee's claim for § 34A benefits resulting from the January 7, 2002 incident. (Insurer br. 1, 15-16.) The insurer maintains that our holding in McCarthy II, that the employee failed to meet her burden of proof under § 1(7A), goes "to the very heart of [her] claim, in other words liability," (Insurer br. 12), and resolves her lack of entitlement to § 34A benefits for all time. Id. at 11. The employee's only legal recourse after McCarthy II, contends the insurer, was to appeal that decision, which she failed to do. Id. at 12, 14. Further, the insurer suggests that the employee's claim for a total knee replacement is barred by principles of res judicata because she had the opportunity and incentive to litigate that claim at the first hearing, and did not do so.[6] Id. at 7-9, 15-16. We disagree.

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[5] The judge reserved and did not decide the employee's § 36 claim or the insurer's claim for recoupment. (Dec. 17.) There is no mention in Decision III of the employee's claim for psychiatric treatment, which was joined at the first hearing.

[6] The insurer cursorily states in its brief that our decision in McCarthy II is the "law of the claim, and a final judgment on the merits of her right to Section 34A benefits." (Dec. III, 14; see also Dec. III, 2, 3, 15.) We assume the insurer is referring to the "law of the case," to which we referred in McCarthy II, supra, at 4, n.4. However, the insurer makes no argument, separate from its res judicata argument, as to how the "law of the claim," might prevent further litigation of the employee's claim. Alicea v. John B. Cruz Constr., 26 Mass. Workers' Comp. Rep. 15, 18 (2012)(argument does not rise to level of appellate argument). As we recently observed "the law of the case doctrine applies, 'probably exclusively, to interlocutory decisions, and gives to them a degree of force not allowed them by the doctrine of *res judicata*.' " Doonan v. Pointe Group Health Care, 28 Mass. Workers' Comp. Rep. ___ (December 15, 2014), quoting Henry T. Lummus, *The "Law of the Case" in Massachusetts*, 9 B.U. L. Rev. 225 (1929). " '[I]t is weaker than res judicata, for it is without force beyond the particular case and does not limit the power of the court.' " Doonan, supra, quoting Lummus, supra. As McCarthy II was not appealed, however, it became a final judgment, and our holding there thus became res judicata. This is the issue we address.

Res judicata, which is comprised of claim preclusion and issue preclusion, bars relitigation of issues and rights already settled between the parties or their privies by final judgment. Hough v. Athol Table LLC, 25 Mass. Workers' Comp. Rep. 301, 304 (2011), citing Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988); Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997). While issue preclusion requires actual litigation of an issue, claim preclusion requires only that a party have "the incentive and opportunity to litigate the matter fully in the first lawsuit." Heacock, supra, at 23-24 quoting Foster v. Evans, 384 Mass. 687, 696 n.10 (1981), quoting A. Vestal, Res Judicata/Preclusion V-401 (1969).

The insurer misapprehends the applicability of principles of res judicata where liability and initial causal relationship have been established. See Kiaresh v. Hasbro, Inc., 28 Mass. Workers' Comp. Rep. ___ (October 16, 2014)(insurer's acceptance of liability also established initial causal relationship). Where a claim is initially accepted, subsequent proceedings may not challenge the establishment of liability. Kareske's Case, 250 Mass. 220, 224 (1924)(with insurer's acceptance, "basic questions of liability under the law are not open for further consideration or different determination"); Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(same). There is no doubt that, even before the 2007 hearing, the insurer had accepted liability for the employee's right knee injury by its voluntary payment of benefits for approximately five years. In addition, the insurer stipulated to acceptance of liability of the employee's right knee injury in the first hearing. That stipulation became a final judgment in McCarthy II, supra. Principles of res judicata thus apply, but not in the way the insurer asserts. Rather than barring relitigation of a finding of no liability, res judicata here bars relitigation of a final judgment affirming liability. See Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 250-251 (1999)(res judicata bars reconsideration of average weekly wage after hearing decision issued containing stipulation).

Once liability was established for the right knee injury, the employee could bring a new claim for incapacity causally related to the work injury for the period after the close

of evidence of the first hearing. In Lopes v. Lifestream, 25 Mass. Workers' Comp. Rep. 121, 124-125 (2011), we explained:

> [T]he 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).

Similarly, in Orlofski v. Town of Wales, 24 Mass. Workers' Comp. Rep. 333, 336 (2010), we held that, where liability had been established for a back injury, a final unappealed decision concluding the employee failed to meet his § 1(7A) burden of proving the work incident remains "a major cause" of his incapacity and need for treatment due to that injury, did not bar a later claim for compensation, specifically medical benefits, for the back injury from a date subsequent to the close of the record in the prior decision. In Orlofski, supra, we relied on c. 152, § 16, which provides, in pertinent part:

> *When* in any case before the department it appears that *compensation has been paid* or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and *such employee . . . may have further hearings as to whether his incapacity . . . is or was the result of the injury for which he received compensation.*

(Emphasis added.) The same holds true here.

The insurer's reliance on our decisions in Cerasoli v. Hale Dev., 13 Mass. Workers' Comp. Rep. 267 (1999) and Sanches v. Framingham State Hosp., 21 Mass. Workers' Comp. Rep. 19 (2007), is misplaced. Both involved unappealed conference orders, and in both, liability was at issue, as it was not here. The language in Cerasoli,

supra, actually contradicts the insurer's position that liability was decided adversely to the employee in McCarthy II. In Cerasoli, we stated that an unappealed denial at conference has "preclusive effect since res judicata applies to issues *like original liability* which, once determined, do not change over time." Id. at 21 (emphasis added).[7] By contrast, incapacity and ongoing causal relationship do change over time, and, in the situation presented here, res judicata does not bar further litigation on these issues. Spencer-Cotter, supra, at 317; Burrill, supra, at 78; see Orlofski, supra, at 335-336 (incapacity and the medical aspect of incapacity not susceptible to final determination since medical conditions and their treatment are mutable).

Thus, our decision in McCarthy II bars a claim for incapacity and medical benefits only for the period covered by the prior hearing decision, October 10, 2007 through March 18, 2008. Our holding there established that § 1(7A)'s "a major cause" standard applies to the employee's 2007 claim, and that she failed to satisfy her burden of proof under § 1(7A) as of the close of evidence of the first hearing. The employee was free to pursue a further claim for § 34A benefits with evidence that her 2002 work injury had become "a major cause" of her incapacity and need for treatment after the close of evidence of the first hearing. Lopes, supra, at 124-125; Orlofski, supra at 335-336. In the decision now before us, the judge found that "since the close of the previous hearing record March 18, 2008 . . . [the employee's] January 7, 2002 right knee injury is, and remains a major cause of her disability and need for medical treatment" including the total right knee replacement." (Dec. III, 14, 15.) The insurer has not challenged these findings or the medical basis for them.[8]

[7] In Sanches, supra, at 21-23, we clarified our decision in Cerasoli, holding that an unappealed conference order is *not* a decision on the merits for the purposes of res judicata, since there is no way to know the basis for the denial at conference; rather, it is more akin to a dismissal in a civil case, which bars further litigation absent relief under § 10A(3).

[8] The insurer does not argue that the medical evidence on which the judge relied was inadequate to support the conclusion that the employee's condition changed after March 18, 2008, so that her work injury became a major cause of her ongoing disability and need for treatment.

See 452 Code Mass. Regs. § 1.15(4)(a)(3)(reviewing board need not decide issues not argued in briefs). Therefore, we affirm the judge's § 34A award beginning March 18, 2008.

Finally, we briefly address the insurer's suggestion that the employee had the opportunity and incentive to litigate her claim for a total knee replacement at the first hearing, and, because she did not, her claim for medical benefits for that surgery are barred by principles of res judicata. (Insurer br., 7, 9, 15.) The need for medical treatment, like incapacity and causal relationship, is mutable. Orlofski, supra, at 336. Here, although one of her physicians contemplated, in evidence presented at the first hearing, that she "will be a candidate for right total knee replacement," (Dec. I, 6), there was no evidence such surgery had been ordered by her doctors, or that the employee intended to have it. The knee replacement surgery was not actually performed until September 8, 2010, more than two-and-a-half years after the evidence closed in the first hearing. We see no reason the employee's claim for that surgery should be barred as a matter of law. See Coelho v. National Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 523 (1998)(previous unappealed decision was res judicata on issue of refusal of surgery only for period of time covered by earlier decision; cf. Laroche v. G&F Indus., Inc., 27 Mass. Workers' Comp. Rep. 51 (2013)(because employee had opportunity and incentive to establish *liability* for back injury when he litigated original claim for knee injury arising out of same incident, res judicata barred later claim for medical treatment for back injury).

Accordingly, the decision is affirmed. Pursuant to G.L. c. 152, § 13A(6), the insurer is directed to pay employee's counsel a fee in the amount of $1,596.24.

So ordered.

Carol Calliotte
Administrative Law Judge

Filed: *March 20, 2015*

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***March 20, 2015***