COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057186-90**

Leon Grant	Employee
APA Transmission	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Robert F. Gabriele, Esq., for the employee
Jean M. Shea, Esq., for the insurer

MCCARTHY, J. The insurer appeals a decision of an administrative judge finding that principles of res judicata and collateral estoppel bar reconsideration of the issue of average weekly wage after the parties stipulated to average weekly wage in a prior unappealed hearing decision. We agree that principles of res judicata, though not collateral estoppel, prevent reopening the issue of average weekly wage under these circumstances. We also conclude that prior agreements entered into by the parties were binding as to average weekly wage in proceedings before the Board, and that, as with other issues settled by agreement, any remedy for reformation of the agreement lies in Superior Court.

Leon Grant injured his lower back at work on October 6, 1990. (Dec. II, 3.)[1] By agreement to pay compensation dated November 28, 1990, the insurer paid a closed period of benefits based on an average weekly wage of $785.31.[2] (Dec. II, 4.) Grant filed

[1] Decision II refers to the decision issued on October 29, 1997, which is the subject of this appeal. Decision I refers to the prior unappealed decision issued on April 20, 1993.

[2] On the agreement, $785.31 was crossed out and $320.00 was inserted for the average weekly wage. (Attachment A, Parties Joint Exhibit List, Joint Ex. 2.) The agreement provided for a weekly payment of $490.57 which was the maximum rate for the year of injury. The judge, however, found that the agreement was based on $785.31 because the insurer agreed to pay the

a claim for further compensation, for which a § 10A conference was held on November 4, 1991. At the conference, the insurer raised average weekly wage as an issue. (Dec. II, 4-5.) The claim was initially denied, but on April 24, 1992, an administrative judge filed a corrected order of payment awarding closed periods of temporary total and temporary partial weekly incapacity benefits pursuant to §§ 34 and 35, respectively, based on an average weekly wage of $785.31. (Dec. II, 4.) Both parties appealed to a hearing de novo. (Dec. I, 3.) At the hearing, which was held on January 12, 1993, the parties stipulated to an average weekly wage of $785.31. (Dec. II, 4; Dec. I, 1.) In her hearing decision, the judge ordered a closed period of § 34 benefits and ongoing § 35 benefits based on the stipulated average weekly wage. (Dec. I, 17-18.) Neither party appealed. (Dec. II, 4.)

The insurer then entered into an agreement to pay § 34 benefits for a closed period from May 4, 1994 to April 11, 1995, based on an average weekly wage of $785.31. (Dec. II, 5; Attachment A, Joint Ex. 21.) On April 12, 1995, the employee filed another claim for § 34 benefits. The claim was heard at conference on September 27, 1995, after which the insurer was ordered to pay § 34 benefits from April 12, 1995 to date and continuing based on the $785.31 average weekly wage. (Dec. II, 6; Attachment A, Joint Ex. 23.) The insurer appealed to a hearing de novo but later withdrew its appeal. (Dec. II, 6.)

Shortly thereafter, the insurer filed a complaint for modification or discontinuance of benefits. The complaint also alleged that the employee's weekly benefit payments for the six prior years had been based on an incorrect average weekly wage. Following the § 10A conference on September 26, 1996, the administrative judge refused to modify benefits. The insurer appealed to a hearing de novo on the issue of average weekly wage only. At the time of the hearing, Mr. Grant filed a motion to have the insurer's complaint dismissed. The judge agreed to rule on the motion in the course of her hearing decision. The hearing on the issue of average weekly wage and the overpayment to the employee

---

employee a § 34 compensation rate of $420.57. (Dec. II, 4.) We find nothing in the record which explains or supports a weekly rate of $420.57.

was held on September 26 and 29, 1997. (Dec. II, 2.) Also at issue was whether the insurer was precluded from raising the average weekly wage at this stage in the claim. (Dec. II, 3.)

At the hearing, Peter Baras, the owner of APA Transmission, testified that he had paid the employee only $320.00 per week. (Dec. II, 3-4.) Baras claimed that some time between 1991 and 1993, he forwarded the insurer a wage computation statement supporting this figure. (Dec. II, 4.) Mr. Baras produced none of the supporting wage records at hearing because, he said, they were destroyed during a storm. Id. The insurer's case manager for this claim testified that in April or May of 1996, he discovered in his file a wage computation schedule indicating that the employee's average weekly wage was $320.00. (Dec. II, 5.) This discovery apparently precipitated the insurer's complaint for discontinuance or modification. The judge refused to allow into evidence the wage computation schedule. (Dec. II, 1.) The insurer maintained that it had overpaid the employee a total of $101,442.17 in weekly benefits. The only witness for the employee was a friend who testified that she had helped with his finances, and each week he gave her what she believed to be his wages for the week, amounting to either $490 or $530. (Dec. II, 5.) The employee did not testify. (9/29/97 Tr. 3-4.)

In her hearing decision of October 29, 1997, the judge found, *inter alia*, that principles of both collateral estoppel and res judicata applied to bar relitigation of the issue of average weekly wage. (Dec. II, 7-9, 10.) Relying on Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994), the judge found that the prior stipulation at hearing necessarily operated to bar reconsideration of average weekly wage. (Dec. II, 9-10.)

Despite her finding that she was precluded from reconsidering average weekly wage, the judge did make some credibility determinations. She found the testimony of the employee's witness " . . . persuasive enough to suggest that the Employee earned more than $320.00 per week." (Dec. II, 10.) She also found Mr. Baras' testimony unpersuasive that neither he nor his accountant could provide crucial documentation regarding the employee's average weekly wage. (Dec. II, 10.) Based on the testimony of

the witnesses as well as on her findings regarding res judicata and collateral estoppel, the judge denied and dismissed the insurer's complaint. (Dec. II, 11.)

The insurer appeals, alleging that 1) collateral estoppel does not bar relitigation of the issue of average weekly wage because the issue was never litigated; 2) res judicata does not apply as the claim was never the subject of a final judgment since average weekly wage was not litigated; and 3) the stipulation as to average weekly wage which was made at the prior hearing should be vacated under principles enunciated in Galindez v. International House of Pancakes, 12 Mass. Workers' Comp. Rep. 214 (1998).[3] The employee has not submitted a response brief. We affirm the judge's decision that, in the circumstances of this case, the issue of average weekly wage may not be reconsidered. However, our reasoning is different from that of the administrative judge in some respects. We agree with the insurer that principles of collateral estoppel do not operate to bar reconsideration of average weekly wage where the issue was stipulated to in a prior hearing decision. The doctrine of collateral estoppel or 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.' " Martin v. Ring, 401 Mass. 59, 61 (1987), quoting Fireside Motors, Inc. v. Nissan Motor Corp. in USA, 395 Mass. 366, 372 (1985), quoting Restatement (Second) of Judgments § 27 (1982) (emphasis added). The insurer cites the Restatement, which further provides that an issue is not "actually litigated if it is the subject of a stipulation between the parties. A stipulation may, however, be binding in a subsequent action between the parties if the parties have manifested an intention to that effect." Restatement, supra § 27 comment e. The parties here did not manifest any intention to make the stipulation entered into at the first hearing binding at the second hearing. In fact, just the opposite was true, as the dispute was over whether the prior stipulation

[3] The insurer's other arguments are rendered moot by our decision.

should be binding. The judge's reliance on Gebeyan, supra, for the proposition that a stipulation at one hearing is necessarily binding in a subsequent one was inappropriate because the parties in that case, unlike those here, had agreed at the second hearing to honor their original stipulation. Id. at 103. Gebeyan mirrored the precise situation contemplated by the Restatement precluding the judge from assigning a different average weekly wage.

However, we agree with the administrative judge that principles of res judicata, or claim preclusion, operate to bar reconsideration of the issue of average weekly wage after a hearing decision was issued containing a stipulation as to average weekly wage. For claim preclusion to apply, three elements are required: "(1) the identity or privity of the parties to the present and prior actions; (2) identity of the cause of action; and (3) prior final judgment on the merits." Gloucester Marine Railways Corp. v. Charles Parisi, Inc., 36 Mass. App. Ct. 386, 390 (1994), citing Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280 (1933).

> The doctrine of claim preclusion 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 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. See Mackintosh v. Chambers, 285 Mass. 594, 596-597 (1934), and cases cited; Restatement (Second) of Judgments § 25 (1980). 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." Foster v. Evans, 384 Mass. 687, 696 n. 10 (1981), quoting A. Vestal, Res Judicata/Preclusion V-401 (1969). See Franklin, supra at 279; Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 342-344 (1948). As such, it applies only where both actions were based on the same claim. Franklin, supra at 279-280.

Heacock v. Heacock, 402 Mass. 21, 23-24 (1988) (emphasis added).

Here, there can be no dispute that the parties are the same. The insurer seems to argue that the cause of action is different because the average weekly

wage was never litigated. However, this argument ignores the fact that claim preclusion does not require actual litigation of an issue, but requires only that the parties had the opportunity and incentive to litigate an issue. As the court stated in Gloucester Marine Railways Corp., supra: "The flaw in [the original defendant's] argument [seeking a redetermination of the amount of its liability] is that claim preclusion bars not only relitigation of all matters decided in a prior proceeding but those that could have been litigated as well (citation omitted). . . . We hold that [the original defendant] cannot now resuscitate a claim that it could have presented differently in the earlier proceedings. . . ." Id. at 391. More basically, a claim to correct average weekly wage for the fifty-two weeks preceding the industrial injury is not a separate and subsequent claim, as are claims under §§ 28 & 36 which may be brought after the original claim is heard. See Heredia v. Simmons Company, 10 Mass. Workers' Comp. Rep. 490, 493 (1996). A determination of average weekly wage was an integral part of the employee's original incapacity claim, and was necessary to the issuance of a decision. However, despite the fact that the insurer had never confirmed with the employer the average weekly wage (Dec. II, 5, 6-7), the insurer chose to stipulate to it at hearing rather than to litigate it. There is no merit to the insurer's assertion that the claim for average weekly wage it now asserts is a new claim or cause of action.

The insurer also argues that the first hearing decision was not a final judgment on the merits. This assertion is simply not supported by the case law. See Stone's Case, 318 Mass. 658 (1945) (unappealed decision of single member [now administrative judge] fully and finally settled the amount of compensation due, and the reviewing board had no authority to modify that decision); Rocha's Case, 300 Mass. 121 (1938) (findings in unappealed hearing decision were final, and could not be reviewed in a subsequent claim before the reviewing board); Gordon's Case, 26 Mass. App. Ct. 924 (1988) (decision of administrative judge was final decision on the claim for purposes of application of § 51A). See also Stowe v. Bologna, 415 Mass. 20, 22 (1993) (Generally, " '[a] final order of an administrative agency in an adjudicatory proceeding, not appealed from and

as to which the appeal period has expired, precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction.' ") Again, it is irrelevant that the issue of average weekly wage was not actually litigated at the first hearing because the parties had the opportunity to litigate it then and chose not to do so.[4]

Finally, the insurer argues that the Board, which is governed by the practice in equity, should use its powers to correct the average weekly wage because it entered into the stipulation at the first hearing under clear mistake. First, it claims that courts disallow stipulations where they would work an injustice against one of the parties. That appears to be a fair statement of the law with respect to vacating a stipulation in the course of a single action. See, e.g., Granby Heights Association, Inc. v. William Dean, 38 Mass. App. Ct. 266, 269 (1995); Crittendon Hastings House of the Florence Crittendon League v. Board of Appeals of Boston, 25 Mass. App. Ct. 704, 712-713 (1987); Loring v. Mercier, 318 Mass. 599, 601 (1945). However, the insurer has cited no cases, and we

---

[4] The insurer acknowledges that claim preclusion bars reconsideration not only of matters that were litigated but also of matters that could have been litigated, but argues that res judicata is an equitable doctrine which should not be invoked where justice would not be served. The insurer claims it did not know average weekly wage was an issue, and states that res judicata may be limited where there has been a change in the factual basis of a claim or where a party has failed to pursue a claim due to the other party's misrepresentation or concealment of material information. (Ins. Brief 7, n. 3.) The insurer makes no allegation that the factual basis of the claim has changed, and the judge found none, nor has it directly alleged that the employee misrepresented or concealed the true average weekly wage, though that is the clear implication. The judge, though finding that principles of res judicata and collateral estoppel barred reconsideration of average weekly wage, also made some credibility findings, and those findings do not support the insurer's position. The judge found the employee's witness credible on the issue of average weekly wage (Dec. II, 9-10, 11), but disbelieved the employer that neither he nor his accountant had any documentation to support the wage statement he allegedly sent to the insurer. (Dec. 10.) Thus, there is no support in the decision for the insurer's suggestion that the employee misrepresented his average weekly wage or that the factual basis of the claim has changed. The insurer further states that it did not know average weekly age was an issue. (Ins. Brief 7, n. 3.) The insurer chose not to contest average weekly wage, even though it had not confirmed the amount with the employer (Dec. II, 5, 6-7). It is disingenuous for the insurer to claim it did not know average weekly wage was an issue when the insurer, in effect, made it a non-issue by stipulating to it in two agreements and a hearing decision. (Dec. 4.)

have found none, in which a court, in a later claim, has vacated a stipulation made in a prior unappealed proceeding.

Second, the insurer cites Galindez v. International House of Pancakes, supra in support of the use of the Board's equitable powers to correct the average weekly wage.[5] (Insurer's Brief, 8). The insurer's reliance on Galindez is misplaced. In that case, we specifically declined to reach the issue of whether principles of res judicata or collateral estoppel barred reconsideration of average weekly wage because the insurer had failed to appeal the administrative judge's decision and was thus prohibited from obtaining a judgment more favorable to it than the judgment entered below. Id. at 216; see Saugus v. Refuse Energy Systems Co., 388 Mass. 822, 830-831 (1983). Given the insurer's failure to appeal, we considered only the retroactive date to which the average weekly wage should be corrected. Galindez, supra at 216.

However, even if the board had authority to reconsider the average weekly wage, the equities of the situation in the instant case would not warrant doing so. Here, not only did the insurer stipulate to average weekly wage at the first hearing, but it also entered into two agreements specifying average weekly wage, and failed to appeal a conference order containing the same average weekly wage. Moreover, the insurer did very little to determine average weekly wage. It relied on the employee's representations and did not

[5] The application of the board's limited equitable powers was most fully discussed in Utica Mutual Ins. Co. v. Liberty Mutual Ins. Co., 19 Mass. App. Ct. 262, (1985). There, the court held that the board had the authority to join, "by any means reasonably calculated to give notice and a right to be heard, any other insurer or insurers it deems necessary for the expeditious and complete disposition of a controversy like the present one. . ." even though there was no statutory provision allowing for joinder of a third party. The court reasoned that "[t]he board is not bound by strict legal precedent or legal technicalities, but, rather, governed by the practice in equity." Id. at 267. The court noted that the term "in equity" had been applied to supply a remedy where there was a gap in the statute and was consonant with the liberal construction to be given c. 152. Id. More recently, in Taylor's Case, 44 Mass. App. Ct. 495 (1998), the court held that the board exceeded its statutory authority under § 11C, when it affirmed the decision of an administrative judge but, sua sponte fashioned a remedy giving the employee leave to reopen his case to retract his § 35B claim. These two cases, when read together, seem to indicate that the board's equitable powers extend to fashioning a remedy where the statute provides none, if such a remedy is "'necessary to dispose completely of the claim.'" Taylor's Case, supra at 498,

even notice the wage statement the employer testified he sent to the insurer until three to five years after it was sent in. (Dec. II, 4, 5.) By contrast, in Galindez, the employee stipulated to an erroneous average weekly wage based on an incorrect wage schedule provided by the employer. At the second hearing, the insurer conceded that the average weekly wage as originally stipulated was incorrect, but disagreed only as to the date to which the correct average weekly wage should be retroactive. In Norton v. National Wholesale Co., 7 Mass. Workers' Comp. Rep. 146 (1993), cited with approval in Galindez, supra, at 216, we held that an administrative judge was not prohibited from correcting, at a later hearing on a new claim, an erroneous average weekly wage, as to which the parties had filed a "Notice of Satisfaction" following a conference order which contained a clerical error regarding the average weekly wage. We noted that at oral argument before us, the insurer agreed that the average weekly wage was incorrect and was caused by a scrivener's error. The facts in Galindez and Norton pointed strongly to allowing correction of a clearly erroneous average weekly wage, whereas those in the instant case do not.

It is important to point out, though the judge did not address it and the parties did not argue it, that average weekly wage holds no special place in the pantheon of issues over which the board has no jurisdiction once it is agreed upon by the parties, as it was on two occasions here. See McLeod's Case, 389 Mass. 431, 434 (1983) (an appellate court properly may consider questions of law which were neither argued nor passed upon by a court or agency below where injustice might otherwise result). Although there was a period of time after 1945 when the Board had the statutory authority to reconsider the issue of average weekly wage when it had been set by agreement, it no longer has that authority. Section 6 of chapter 152, as amended in 1945, specifically allowed the administrative judge to modify the average weekly wage after the parties had entered into

---

quoting Utica Mutual, supra at 267. In the instant case, we see no need for the board to fashion a remedy.

an agreement.[6] However, that authority was modified in 1985, when the provisions of § 6 were transferred to § 19, and again in 1986.[7] It is significant that the most recent amendment to § 19 in 1991 omits any mention of the Board's authority to reconsider average weekly wage after an agreement has been finalized.[8] " 'It is a well settled rule, that when any statute is revised or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance which is altogether inadmissible.' " Brockton Edison Co. v. Commissioner of Corporations and Taxation, 319 Mass. 406, 411 (1946), quoting Ellis v. Paige, 1 Pick 43,

---

[6] General Laws c.152, § 6, was amended by St. 1945, c. 347, to state in relevant part:

> If the insurer and the injured employee reach an agreement in regard to compensation, a memorandum thereof shall be filed with the department, and, if approved by it, the memorandum shall for all purposes be enforceable under section eleven; provided that as to the average weekly wages therein contained, the department or a member thereof may, on petition by the employee, insurer or insured, change such average weekly wages if the facts found so warrant. . . .

(emphasis added).

[7] In 1985, § 6 was rewritten to deal with notice of injuries. The statutory provisions relating to agreements were transferred to § 19, and any mention of the ability of the Board to reconsider average weekly wage was removed:

> Subject to the approval of the department, questions arising under this chapter may be settled by agreement by the parties interested therein, except as otherwise provided in this chapter. The agreement shall for all purposes be enforceable in the same manner as an order under section twelve. A party to such agreement may file a complaint to vacate or modify the agreement on grounds of law or equity.

St. 1985, c. 572, § 33, by § 70 made effective Nov. 1, 1986 (emphasis added).

Section 19 was further revised in 1987 to read, in relevant part:

> Except as otherwise provided by section seven, any payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement. Said agreements shall for all purposes be enforceable in the same manner as an order under section twelve. A party to such agreement may file a complaint to vacate or modify the agreement on grounds of law or equity.

St. 1987, c. 691, § 9, approved Jan. 6, 1988 (emphasis added).

[8] The fourth sentence of the 1987 version of § 19 (underlined in footnote 6 above) was removed by St. 1991, c. 398, § 41.

45. Thus, the current law on reforming an agreement as to average weekly wage is well set out in Perkins's Case, 278 Mass. 294 (1931):

> If it is contended by either the employee or the insurer that the validity of an agreement thus approved is tainted by fraud or mistake, the proper tribunal for the investigation and settlement of that controversy is the Superior Court. . . . When an instrument of the finality of a memorandum of agreement has been acted upon, it has passed beyond the control of the board so far as concerns inquiry as to its validity. Accident and mistake touching such a matter are proper subjects for investigation under general principles of equity, which in the main govern proceedings in court under the workmen's compensation act. Gould's Case, 215 Mass. 480, 482-483. This is in accord with the statement in O'Reilly's Case, 258 Mass. 205, 209: "After an agreement has been approved by the department, and acted upon, any party in interest may and should present that agreement to the Superior Court for a decree of reformation and cancellation, if such a decree would be justified on the facts had the agreement been made in a suit heard and determined in that court."

Perkins, supra at 299. See also Virta's Case, 287 Mass. 602, 605 (1934) ("[T]he agreement fixing the employee's average weekly wage . . . was binding upon the board, and was conclusive as to that fact for the purpose of the entry of a decree by the Superior Court, unless the agreement was reformed or cancelled by the Superior Court"); New Amsterdam Casualty Co. v. Walter Stens, 288 Mass. 302 (1934) (suit to reform an agreement regarding amount of average weekly wage was brought in Superior Court).

Given the statutory history, we hold that the Board has no authority to re-open the issue of average weekly wage, once it has been settled by agreement. If a party believes that there has been fraud or mistake in the establishment of average weekly wage, the remedy lies in Superior Court. Our reading of § 19 supports giving a stipulation as to average weekly wage made at hearing the same conclusive effect as a stipulation as to average weekly wage made as part of a § 19 agreement.

For the above reasons, the decision of the administrative judge is affirmed.

So ordered.

_____	_____
William A. McCarthy	Sara Holmes Wilson
Administrative Law Judge	Administrative Law Judge

Smith, J. concurring. I concur in the majority except for the dicta about the Board's "equity powers." As the Supreme Judicial Court said initially in 1917 and Appeals Court reemphasized as recently as 1998:

> . . . the Industrial Accident Board is not a court of general or limited common-law jurisdiction, . . . it is purely and solely an administrative tribunal, specifically created to administer the Workmen's Compensation Act in aid and with the assistance of the superior court, and as such possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers. . . . full performance of the conditions of the act are essential prerequisites to the jurisdiction of the Board, and . . . its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed, by express consent, or waived by acts of estoppel.

Levangie's Case, 228 Mass. 213, 216-217 (1917) (citations omitted); Taylor's Case, 44 Mass. App. Ct. 495, 497 (1998).

The Worker's Compensation Act, G.L. c. 152, does not invest the Board with "equity powers." A claim under the Act is not "an equity cause," although worker's compensation practice or procedure follows or resembles that prevailing in equity. Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 54 (1913); Devine's Case, 236 Mass. 588, 593 (1921); Fontaine's Case, 246 Mass. 513, 516 (1923). Here, as in Utica Mut. Ins. Co v. Liberty Mut. Ins. Co, 19 Mass. App. Ct. 262 (1985), the decisive event occurred when the insurer chose to agree on, rather than to litigate, a fundamental issue. See Id. at 268. The Board lacks any statutory authority to revise that agreement. Perkins's Case, 278 Mass. 294, 299 (1932).

I concur that the insurer's only remedy, if one exists, lies in the equity jurisdiction of the superior court. Because the judge's decision was not arbitrary or capricious, or contrary to law, it should be affirmed. G.L. c. 152, § 11C.

Filed: July 22, 1999

_____
Suzanne E.K. Smith
Administrative Law Judge