COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	BOARD NO. 036667-04
Lydia Suliveres	Employee
Durham School Service	Employer
U. S. F. & G.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol[1])

APPEARANCES
Matthew W. Gendreau, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Michael E. Kiernan, Esq., for the insurer
Meredith S. Davison, Esq., for the insurer on appeal

The case was heard by Administrative Judge Rose.

COSTIGAN, J. Based on the principle of res judicata,[2] the administrative judge denied and dismissed the employee's second claim for benefits for a left wrist

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[1] Administrative Law Judge Koziol recused herself from the panel because she had presided, as an administrative judge, at the 2005 conference on the employee's original claim.

[2] Res judicata is defined as,

> [a] matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. [Citation omitted.] And to be applicable, requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. [Citation omitted.]

Black's Law Dictionary, 1305-1306 (6th ed. 1990).

carpal tunnel syndrome.[3] Seeing no merit in the employee's appeal, we affirm the judge's decision.

The date of injury in the present claim, November 5, 2004, was also cited as the date of injury in an earlier claim the employee filed, alleging a right wrist carpal tunnel condition. In a 2006 hearing decision,[4] the same administrative judge awarded benefits for injuries to the employee's right shoulder, arm and wrist. (Dec. I; Tr. 2.) In the course of that litigation, however, the issue of the employee's left wrist condition was addressed in the medical evidence, and the judge concluded the left wrist condition was not causally related to the employee's work.[5] (Dec. I; Tr. 9.) As

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> "Res judicata" bars relitigation of the same cause of action between the same parties where there is a prior judgment, whereas "collateral estoppel" bars relitigation of a particular issue or determinative fact.

Id. at 1306. "The term 'res judicata' describes doctrines by which a judgment has a binding effect in future actions. It comprises both claim preclusion (also known as 'merger' and 'bar') and issue preclusion (also known as 'collateral estoppel')." Jarosz v. Palmer, 436 Mass. 526, 530 n.3 (2002). Because the original litigation in this case involved more than the left carpal tunnel syndrome claim, see footnote 5 infra, we think collateral estoppel was the more accurate defense to be raised by the insurer, and the more accurate bar to be applied by the judge to the employee's claim in the second round of litigation. This distinction, however, does not alter our analysis of the employee's appeal.

[3] The board file reflects the employee's present claim, filed in January 2007, alleged the injury to be "Carpal tunnel – right hand and right side." In the temporary conference memorandum submitted at the July 5, 2007 conference, the "Nature and Cause of Injury" was typed as "Carpel [sic] tunnel both hands; right side," but amended in writing to read, "Carpel [sic] tunnel L[eft] hand/wrist" only. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of documents in board file permissible).

[4] The parties stipulated the judge could take judicial notice of his prior decision and the entire board file. (Tr. 4.) Pursuant to Rizzo, supra, we do likewise. Therefore, references in this opinion to the 2006 hearing decision are designated, "Dec. I," and to the 2008 decision on appeal, "Dec. II." All transcript references are to the March 25, 2008 hearing.

[5] Although a left wrist carpal tunnel syndrome was not part of the employee's original claim filed in 2005, (Tr. 11), in his October 17, 2005 report, the § 11A impartial medical examiner, Dr. Armand Aliotta, recounted a history of the employee experiencing symptoms of numbness and tingling in both arms. He made several diagnoses, including "[b]ilateral carpal tunnel syndrome, probably with mild median neuropathy on the right side and more advanced on the left side." He opined the employee's symptoms were "a result of her work

a general rule, "[w]here there is no claim and, therefore, no dispute . . . the judge stray[s] from the parameters of the case and err[s] in making findings on issues not properly before [him]." Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994). See also, Gleason v. Toxicon Corp., 22 Mass. Workers' Comp. Rep. 39, 41 (2008), citing Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327 (2000). Here, however, neither party appealed from that decision.[6] (Tr. 2.) Moreover, when the employee's left wrist injury claim came on for hearing in

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and are related to re-use syndrome with the claimant's occupation as a bus driver." (Stat. Ex. 1 to Dec. I.) Because Dr. Aliotta did not offer a disability opinion, the judge declared his report inadequate and allowed additional medical evidence. (Dec. I, 2.) Although the judge adopted Dr. Aliotta's opinion that the employee's right carpal tunnel syndrome was causally related to her work activities, he found the employee,

> has not presented a credible factual basis for over-use syndrome for her left wrist. She did testify that use of the steering wheel worsened her symptoms, but none of the doctors finds credible, persuasive causation as to any repetitive body movements in regards to the steering wheel causing left carpal tunnel syndrome. Dr. Brody's opinion of November 15, 2004 comes close to the employees [sic] burden of proof, but unfortunately he qualifies his opinion by using the words "may be," which are obviously legally insufficient. He also mentions repetitive gripping the steering wheel, but fails to give an opinion as to causation. Therefore, the employee's claim for left carpal tunnel lacks a credible factual foundation, and also lacks a persuasive medical opinion on causation.

(Dec. I, 4-5.)

[6] In early May 2007, approximately six weeks after she filed her second claim, and some fifty weeks after the 2006 hearing decision was filed, the employee petitioned the commissioner of the department for permission to file a late appeal from that decision. See G. L. c. 152, § 11C("Any party aggrieved by a decision of an administrative judge after a hearing held pursuant to section eleven shall have thirty days from the filing date of such decision within which to file an appeal from said decision to the reviewing board. A party who has by mistake, accident, or other reasonable cause failed to appeal from a decision within the time limited herein may within one year of the filing of said decision petition the commissioner of the department who may permit such appeal if justice and equity require it. . . .") The insurer opposed the petition and the commissioner denied it. The employee requested reconsideration of the denial and the commissioner affirmed his earlier ruling. (Ins. br. 3.) The employee argues the commissioner's actions were arbitrary and capricious, (Employee br. 1), and "requests that her petition for appeal of the initial Hearing [sic] be reconsidered." (Id. at 13-14.) This board lacks statutory authority to do so. See G. L. c. 152, § 11C.

2008, employee's counsel stipulated on the record that the left wrist claim had been tried by consent in the earlier litigation.[7] (Tr. 11-12.) The judge therefore bifurcated the hearing to first address the res judicata defense raised by the insurer, that is, whether the employee could relitigate the issue of initial causal relationship between her left wrist carpal tunnel condition and her work activities. The criteria to be met are well-established:

> The burden is on the party claiming res judicata by reason of a prior adjudication to allege enough facts in [its] plea or motion to establish that the cause of action was (1) between the same parties; (2) concerned the very same subject matter; and (3) was decided adversely to the party seeking to litigate the subject matter again. See New England Home for Deaf Mutes v. Leader Filling Stations Corp., 276 Mass. 153, 157 [1931]. A party relying on res judicata as an affirmative defense must prove either from the record of the former action or from extrinsic evidence the subject matter decided in the earlier judgment. Daggett v. Daggett, 143 Mass. 516, 521 [1887]. Cote v. New England Navigation Co., 213 Mass. 177, 182 [1912]. Boston & Maine R. R. v. T. Stuart & Son Co., 236 Mass. 98, 102 [1920]. . . .

Fabrizio v. U. S. Susuki Motor Corp., 362 Mass. 873, 873-874 (1972).

We are satisfied the insurer met its burden. The parties stipulated the judge could take judicial notice of his prior decision and the entire board file. (Dec. II, 2.) Cf., Paganelli v. Massachusetts Turnpike Auth., 21 Mass. Workers' Comp. Rep. 9, 15-16 (2007)(insurer failed to produce evidence of earlier decision claimed as source of res judicata defense). It is beyond dispute that the parties were identical in both adjudications, and the judge's first hearing decision was adverse to so much of the employee's claim as alleged left wrist carpal tunnel syndrome. Moreover, the left wrist carpal tunnel syndrome claimed in the 2008 litigation was identical to the condition the judge found not causally related in the earlier decision, from which the employee did not perfect an appeal. See footnote 6, supra.

[7] Notwithstanding that stipulation, employee's counsel now contends the employee did not appeal the judge's 2006 decision because she "did not claim the left carpal tunnel injury at [that] time." (Employee br. 5.)

The judge concluded the employee was not entitled to relitigate the issue of causation relative to the left wrist carpal tunnel syndrome:

> The employee argues that she can relitigate original causation, just as she can relitigate disability, based on a change of circumstances, specifically a worsening of her condition. See transcript page 3. The cases cited by the employee to support this position involve situations where traditional newly discovered evidence allows relitigation. In those rare situations, it is the employee's burden to show that the newly discovered evidence was unavailable with due diligence at the time of the original hearing. Here, the employee provides no argument or offer of proof that satisfies the exception. Instead, the issue of original causation for the employee's claimed left wrist carpal tunnel was tried to a final judgement on the merits with no appeal; the parties are identical; the issues are identical, and the issue decided was essential to the prior judgement. [Citations omitted.]

(Dec. II, 3; emphasis in orginal.)

We agree with the judge's analysis. Although the employee offered different medical evidence than that considered in the 2006 hearing, she made no showing such evidence had as its foundation any newly discovered evidence that was unavailable in the earlier litigation.[8] See Buonanno v. Greico Bros., 15 Mass. Workers' Comp. Rep. 91, 95 (2003)(different vocational expert evidence not "newly discovered evidence" sufficient to defeat res judicata effect of earlier decision's vocational findings); cf. Carmody's Case, 333 Mass. 249 (1955)(newly discovered evidence not previously discoverable with due diligence defeats application of res judicata). Certainly an insurer may challenge *ongoing* causal relationship in a present disability proceeding, see Himmelman v. A. R. Green, Inc., 9 Mass. Workers' Comp. Rep. 99, 101 (1995), but the same cannot be said of an employee faced with a final, unappealed hearing

[8] The employee argues the medical evidence confirmed her left carpal tunnel syndrome had worsened between the two hearings. She specifically points to the January 9, 2007 office note of Dr. Victor Panitch, who wrote that she "comes in today because the left hand the carpal tunnel we have known that she has had for a long time is getting much worse and she is requesting the surgery. She just says she just cannot take it anymore." (Employee br. 7.) The employee's argument is wide of the mark. A mere showing that a condition, already determined in a final judgment on the merits to be non-work related, has worsened, is wholly insufficient to defeat the application of res judicata or collateral estoppel.

decision finding no original causal relationship. The judge did not err in according preclusive effect to his earlier decision denying the employee's left carpal tunnel syndrome claim.

The decision is affirmed.[9]

So ordered.

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **February 22, 2010**

[9] In its reply brief, the insurer argues, for the first time, that the employee's appeal to the reviewing board is frivolous, warranting the assessment of costs against employee's counsel under § 14(1). General Laws c. 152, § 14(1), provides, in pertinent part:

> If any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

Although we are troubled that the employee's attorney on appeal refuses to acknowledge the stipulation made by employee's counsel at hearing, see footnote 7, supra, considering all the circumstances, we deny the insurer's request for § 14(1) costs.