COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 001511-04

Rosaida Ellis	Employee
Harvard Vanguard Medical Assoc.	Employer
Sentry Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Tirrell.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Charles E. Berg, Esq., for the employee on brief and at oral argument
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief and at oral argument

COSTIGAN, J. The employee argues the administrative judge erred in ruling that her claim for weekly incapacity benefits based, in part, on a psychiatric disability, was barred by operation of res judicata.[1] We agree, reverse the judge's

[1] 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).

> "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.

decision in part, and recommit the case for further proceedings consistent with this opinion.

There have been two rounds of litigation in this case, and the procedural histories of both are relevant to this appeal.[2] The employee, a medical assistant whose job entailed significant computer data entry, developed right arm epicondylitis, causing her to leave work on January 8, 2004. The insurer accepted liability and paid the employee § 34 total incapacity benefits from January 28, 2004 through August 1, 2004, and § 35 partial incapacity benefits from and after August 2, 2004, when she returned to light duty work as a medical interpreter. (Dec. I, 3, 5; Dec. II, 2-3.) The employee was laid off on January 8, 2006 when her interpreter's job was eliminated. (Dec. I, 5.) She then filed a claim for § 34 total incapacity benefits from and after January 8, 2006, based on both her accepted right arm injury and a claimed left arm injury due to overuse. (Dec. I, 2.) One week prior to conference, the employee moved to join a claim for psychiatric treatment and disability allegedly resulting from her physical injuries. Joinder was allowed at the August 31, 2006, § 10A conference, and the insurer was allowed to join a claim for further modification of weekly compensation, based on its contention the employee had a higher earning capacity. We take judicial notice of the judge's conference order, contained in the board file, which denied the claim for § 34 compensation and directed the insurer to "continue to pay benefits at the

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Palmer, 436 Mass. 526, 530 n.3 (2002). Because both the original litigation and the decision now on appeal in this case involved more than the psychiatric claim, we think collateral estoppel was the more accurate defense to be raised by the insurer, and the more accurate bar available to the judge in the second hearing. This distinction, however, does not alter our analysis of the employee's appeal.

[2] References herein to the transcript of the March 14, 2007 evidentiary hearing are designated, "Tr. I," and to the hearing decision filed on July 26, 2007, "Dec. I." References to the transcript of the January 6, 2009 evidentiary hearing are designated, "Tr. II," and to the hearing decision filed on March 30, 2010, "Dec. II."

current level."[3] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp Rep. 160, 161 n.3 (2002). The order did not address the employee's claimed left arm and psychiatric injuries. Both parties appealed. (Dec. II, 3-4.)

The parties appeared before the judge for hearing on March 14, 2007. Prior to the commencement of testimony, the employee moved to withdraw her claim for the psychiatric injury:

> The Judge: And just as an administrative matter, Mr. Weiner, it is my understanding you are going to withdraw the psychiatric claim?
> Mr. Weiner: Yes. I'd like to withdraw at this time any claim for psychiatric *without prejudice*, your Honor.
> The Judge: *So be it.* Do you have any objection to that?
> Mr. Curtin: *No objection*, your Honor.

(Tr. I, 5; emphases added.) In his decision, the judge found the employee had suffered both right and left upper extremity injuries, but that she remained only partially incapacited and entitled to the same § 35 benefit of $212.63 per week. (Dec. I, 5-6, 9; Dec. II, 4.)

In early 2008, the employee filed the present claim for § 34 total incapacity benefits from January 18, 2006 and continuing, citing her bilateral upper extremity injuries and once again claiming a psychiatric injury. Among its defenses, the insurer argued the employee was precluded, under the doctrine of res judicata, from bringing the psychiatric claim anew, as the 2006 conference order purportedly had denied that claim, and the employee later withdrew the psychiatric aspect of her appeal, thus establishing that the alleged psychiatric injury was not work related.[4] See Cerasoli v. Hale Dev. Co., 13 Mass. Workers' Comp. Rep. 267

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[3] The employee was receiving § 35 partial incapacity benefits at the rate of $212.63, based on a pre-injury average weekly wage of $759.01 and an earning capacity of $404.63. (Dec. I, 8.)

[4] General Laws c. 152, § 10A(3), provides, in pertinent part:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing

(1999)(liability claim denied at conference and not appealed to de novo hearing is final adjudication barring future proceedings). (Dec. II, 5-6.) The judge agreed with the insurer:

> The issue of whether the employee is barred from bringing a psychiatric claim was addressed by both parties. In a prior claim the employee had joined a psychiatric aspect to her claim for temporary total disability benefits. The employee asserted that she had both physical and psychiatric conditions causally related to her industrial injury. While the employee sought to upgrade her benefits from partial disability to total disability benefits, the insurer sought an increased [sic] the employee's earning capacity. At Conference I declined to disturb the current level of benefits. Both parties appealed to a Hearing de novo at which the employee withdrew her psychiatric claim. I am persuaded that under these circumstances the employee is barred by the doctrine of res judicata from now bringing a psychiatric claim forward. In the employee's prior case a psychiatric claim had been withdrawing [sic] at Hearing after having been asserted at Conference. No psychiatric benefits were allowed and no change in the employee's current level of benefits was ordered. The employee appealed the Conference Order but, at Hearing, withdrew the psychiatric aspect of her claim. Liability for the psychiatric issue had never been accepted or established prior to withdrawal. I am persuaded, as the insurer argues in its motion to dismiss, that under the Cerasoli case the withdrawal of the employee's psychiatric claim at the prior Hearing now precludes the issue from being raised in this, a second, proceeding. [Citation omitted.]

(Dec. II, 4-5.)

The errors afflicting the insurer's res judicata argument and the judge's application of the doctrine to bar the employee's psychiatric claim are twofold. First, the 2006 conference order did not even reference, let alone expressly deny, the employee's claim of psychiatric disability. The order merely denied the employee's claim for § 34 benefits and ordered the insurer to "continue to pay

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> pursuant to section eleven.
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> . . .
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> Failure to file a timely appeal or withdrawal of a timely appeal shall deemed to be acceptance of the administrative judge's order. . . .

benefits at the current level."[5] (Dec. I, 2.) Even assuming arguendo that the order constituted a denial of the employee's left arm and psychiatric claims, the employee filed a timely appeal, preserving such claims for litigation at a § 11 hearing.

The employee correctly argues that her psychiatric claim was not finally adjudicated in 2007 and thus, the judge's 2010 dismissal of the claim on res judicata grounds was arbitrary, capricious and contrary to law. The crucial factors in the procedural history we have recounted are the insurer's acquiescence to the employee's motion to withdraw her psychiatric claim *without prejudice*, and the judge's allowance of the withdrawal *without prejudice*. (Tr. I, 5.) The definition of "without prejudice" is instructive:

> Where an offer or admission is made "without prejudice," or a motion is denied or a suit dismissed "without prejudice," it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided. . . . *A dismissal "without prejudice" allows a new suit to be brought on the same cause of action.* The words "without prejudice", as used in judgment, ordinarily import the contemplation of further proceedings, and, when they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy. [Citation omitted.]

Black's Law Dictionary, 1630 (6th ed., 1990). (Emphasis added.)

Although the doctrine of res judicata did not apply in this case, the doctrine of equitable estoppel did. The judge's allowance of the without prejudice withdrawal invited the employee's reliance on his action to her detriment. As such, the judge was equitably estopped from later reversing his allowance of the withdrawal, without prejudice, of the employee's psychiatric claim. "[I]n order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted in harm and that the other knew or had reasonable cause to

[5] Thus, even if there had been no further proceedings, the order could not be a basis to preclude the employee's present claim.

know that such consequences might follow." O'Blenes v. Zoning Bd. of Appeals of Lynn, 397 Mass. 555, 558 (1986). Here, the employee was induced to take her action of withdrawing her psychiatric claim by the actions of both the insurer and the judge. See Donovan's Case, 58 Mass. App. Ct. 566, 569 (2003)(employee's withdrawal of conference order appeal induced by insurer's offer of settlement; once accepted, insurer equitably estopped from refusing to execute lump sum agreement when employee died in interim); cf. Zinkevich v. Woolworth Corp., 17 Mass. Workers' Comp. Rep. 512 (2003)(no detrimental reliance based on insurer's action).

Stated another way, the withdrawal of the psychiatric claim without prejudice -- proposed by the employee, unobjected to by the insurer, and authorized by the judge -- became the law of the case.

> A statement of the judge during the trial as to the issues being tried or as to his understanding of those issues is binding on [the same litigants in a later phase of the same proceeding] where nothing is said by counsel to correct such understanding . . . or where the record does not disclose that the judge was in error. It becomes the law of the trial.

Dalton v. Post Publ. Co., 328 Mass. 595, 599 (1952). See Smith v. Partners Healthcare Sys., Inc., 24 Mass. Workers' Comp. Rep. 43 (2010)(employee waived otherwise valid objection to admission of doctor's opinion by acquiescing to its use); Page v. O.P. Viau & Sons, 14 Mass. Workers' Comp. Rep. 143, 146-147 (2000)(waiver of objection or defense is binding as law of the case regardless of underlying merits). Had the judge not allowed the withdrawal "without prejudice," or had the insurer objected to the without prejudice characterization, the parties and the judge could have addressed the legal parameters of that issue, and each party could have preserved its appellate rights. See footnote 4, supra. Instead, the insurer acceded on the record to the without prejudice withdrawal, (Tr. I, 5), only to argue at the second hearing that the withdrawal was a "procedural ploy" which, if allowed, could permit the employee to "keep adding injuries . . . each time a case fails and . . . try it all over again. . . ." (Tr. II, 9.) The insurer's

about-face not only violated the principle of equitable estoppel and the law of the case, but ran afoul of simple fair play. We agree with the employee's argument at hearing:

> [T]he psychiatric component of this matter has never properly been before the court for consideration and that given . . . the totality of this particular circumstance I think the matter is before your Honor properly today; [and] that the employee has her full rights to present the matter to the court for original liability[6] of the psychiatric claim going back to the industrial accident of January 8, 2004.

(Tr. II, 12.)

Accordingly, we reverse so much of the judge's decision as barred litigation of the employee's psychiatric claim based on res judicata. We recommit the case for further proceedings on the employee's psychiatric claim.

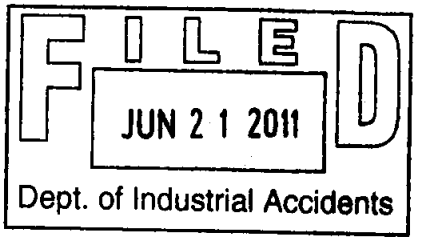
So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed:



[6] Although the employee argued "original liability," she alleged her psychiatric condition was a sequella of her physical injury, for which the insurer had accepted liability. Thus, the issue, more precisely, was and is causal relationship.