COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 004428-06

Rose Boyden	Employee
Epoch Senior Living, Inc.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Novick.

APPEARANCES
Charles E. Berg, Esq., for the employee
Michael K. Landman, Esq., for the insurer

HORAN, J. The employee appeals from a decision[1] dismissing, with prejudice, her psychological injury claim. The judge found the insurer properly raised and proved that the doctrine of res judicata barred the claim. (Dec. II, 9-13.) We affirm.

On February 12, 2006, the employee was struck by a plow in her employer's parking lot. The insurer accepted liability for the employee's physical injuries. In a prior hearing decision,[2] a different administrative judge concluded that as of September 19, 2006, the employee's work-related physical injuries no longer incapacitated her from work. (Dec. I, 5-6, 10.) The judge also dismissed the employee's claim that she suffered a psychological injury as a result of her work-related physical injuries. (Dec. I, 6-7, 9-10.) See Cornetta's Case, 68 Mass.

[1] We refer to this decision, filed on May 19, 2010, as Dec. II. The transcript of this hearing is referred to as Tr. II.

[2] This decision was filed on February 11, 2008; we refer to it as Dec. I. The reviewing board vacated the benefit award and affirmed the judge's dismissal of the employee's claims for incapacity owing to her (accepted) physical, and (claimed) psychological, injuries. See Boyden v. Epoch Senior Living, Inc., 23 Mass. Workers' Comp. Rep. 61 (2009), affirmed sub nom Boyden's Case, 76 Mass. App. Ct. 1138 (2010). The employee did not seek further appellate review within the time prescribed by M.R.A.P. 26.1.

App. Ct. 107 (2007). The judge's denial and dismissal of the employee's claim of an alleged psychological injury was affirmed by the reviewing board and the Appeals Court. See footnote 2, supra.

Undaunted by these developments, the employee filed a second claim for psychological injuries, based on the same injury date, seeking benefits under §§ 13, 30 and 34 from February 12, 2008,[3] to date and continuing. (Tr. II, 5.) At the hearing, the judge took judicial notice of both the first hearing decision and the decision of the reviewing board.[4] (Tr. II, 10.) Apprised of the insurer's intention to file a formal motion to dismiss the employee's claims on res judicata grounds, the judge bifurcated the hearing and requested briefs from the parties to address "whether or not the employee can proceed with her claim for psychological disability benefits based on an injury date of February 12th of 2006." (Tr. II, 4.) As an offer of proof in support of her arguments the employee submitted, for identification purposes only, the medical reports of Dr. Olwarewaju Oladipo, Dr. Steven Hoffman and Dr. Salvatore Rizzo. (Tr. II, 9-10; Employee Exs. 1-3.)

In her brief to the judge opposing the insurer's motion to dismiss, the employee relied upon G. L. c. 152, § 16, to support her argument that her second psychological injury claim (also based on her February 12, 2006 injury date), was not barred by the doctrine of res judicata. Section 16 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 . . . the result of the injury for which he received compensation; provided, however, that

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[3] This was the day after the filing of the first hearing decision. See footnote 2, supra.

[4] The judge was also aware that the employee had appealed the reviewing board decision. (Dec. II, 11; Tr. II, 3.)

> if the board shall determine that the petition for such rehearing is without merit or frivolous, the employee . . . shall not thereafter be entitled to file any subsequent petition thereof except for cause shown and in the discretion of the member to whom such subsequent petition may be referred. . . .

The judge rejected the employee's argument:

> [W]hat is fundamental to being able to litigate issues of extent of disability under Section 16 is an acceptance of or finding that the insurer is liable for the particular injury upon which the claim is based. To argue otherwise would negate the doctrine of *res judicata*. A post-hearing medical opinion that the employee suffers an emotional disability causally related to her injury for a period of time subsequent to that decision does not permit her to relitigate the issue [of] liability [for] those psychiatric conditions that were found not to be causally related to her industrial injury in the first instance under the guise that she is merely litigating the issue of the extent of her disability.

(Dec. II, 11.)

The employee also argued that whereas her *first* claim for benefits for a psychological injury was a sequela of her work-related physical injury, see Cornetta, supra, her *second* claim was different because she was alleging a "purely psychiatric injury" of which the industrial accident itself was the predominant contributing cause. (Dec. II, 11.)[5] The judge also rejected this argument:

> The employee is not pursuing a new claim, she is pursuing her old claim, but with a new theory of causation regarding her claimed psychological conditions. Dr. Hoffman's medical reports . . . cover periods of time both before and after the February 11, 2008 hearing decision. The history of the employee's industrial accident in these reports are [sic] the same, the complaints of the employee are the same, his diagnoses are the same . . . and his opinion as to causal relationship is the same. . . . A new or different characterization of the same circumstances and opinion of the case does not entitle a claimant to relitigate issues already decided. [case citations

[5] See General Laws c. 152, § 1(7A), which provides, in pertinent part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment.

> omitted]. This is nothing more than an attempt to get a second try when the first one failed. The law does not permit her to do so.

(Dec. II, 12.)[6] Concluding that the insurer had met its burden of proving the elements of res judicata, the judge dismissed the employee's claim with prejudice. (Dec. II, 13.)

On appeal, the employee makes the same arguments advanced below and contends the judge erred as a matter of law by dismissing her claim on res judicata grounds. There was no error.

Res judicata is comprised of two doctrines, "issue preclusion" and "claim preclusion." Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). Issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Id. It requires a determination that "the issue in the prior adjudication was identical to the issue in the current adjudication." Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998). Claim preclusion has three elements: "(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." DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001), quoting Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280 (1933). "Claim preclusion . . . prevents relitigation of all matters that were or could have been

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[6] Although the employee did not argue, in her brief to the judge, that her second claim for a psychological injury was based on newly discovered evidence, the judge also noted that the employee failed to provide such evidence. "There is nothing new here that would permit the employee to proceed with her case. She already had a full opportunity to litigate whether the psychological conditions she claims she suffered from were causally related to her industrial injury. The statute does not permit her to try again and again." (Dec. II, 12.) In her brief to this board, the employee does not argue that her second claim for a psychological injury is based on newly discovered evidence, and does not challenge the judge's finding that her offer of proof did not constitute such evidence. Newly discovered evidence is defined as "important evidence of such a nature as to be likely to have a material effect upon the result, which could not reasonably have been discovered before the trial by the exercise of proper diligence. . . ." Lopes's Case, 277 Mass. 581, 586-587 (1931).

adjudicated in the action." O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259 (1998), quoting Blanchette v. School Comm. of Westwood, 427 Mass. 176, 179 n.3 (1998). These doctrines apply to workers' compensation proceedings. Martin v. Ring, 401 Mass. 59, 61 (1987).

We agree with the judge's analysis of the first hearing decision. That decision unambiguously rejected the employee's claim of a psychological injury as a sequela of her physical work-related injury. (Dec. I, 6-7, 9-10.) The rejection of the employee's appeal of that decision by this board, and the Appeals Court, is a final determination of the merits of the employee's claim. Even assuming, *arguendo*, that the nature of the employee's second claim did not present the "identical" issue as the first (as the employee alleged a different theory as to the cause of her alleged psychological injury), the employee's second claim is barred by the doctrine of claim preclusion because she *could have* developed and advanced her alternate theory of causation at the first hearing.

We also agree with the judge's analysis of G. L. c. 152, § 16, as applied to the facts of this case. (Dec. II, 10-12.) No further comment is required.

Accordingly, the decision is affirmed.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

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