COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 049067-03**

Shawn Hough	Employee
Athol Table LLC	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Maher.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Robert J. Riccio, Esq., for the insurer at hearing
Holly B. Anderson, Esq., and Daniel M. Cunningham, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision barring his claim for further compensation on res judicata grounds. We affirm.

The first hearing decision in this case was issued on September 29, 2006.[1] The judge in that case found that the employee's work-related right shoulder injury of December 3, 2002,[2] had resolved by the time of his November 7, 2005, § 11A examination.[3] (Dec. I, 6-7.) In denying the employee's claim for ongoing § 35 benefits, that judge adopted the opinion of the § 11A physician and concluded that although the employee was disabled due to an "impingement syndrome in his right shoulder," it was caused not by his work, but "by time, age

[1] This decision will be referred to as Dec. I, and the second decision, issued on April 16, 2010, will be referred to as Dec. II. The judge in this case took judicial notice of the first decision, filed by a different judge, and admitted it as an exhibit. (Dec. II, 2; Ex. 5.)

[2] The employee, working as a shipper/receiver, pulled "a skid up an incline, the skid got caught and the employee felt pain in his right shoulder." (Dec. I, 5.)

[3] The judge also rejected the employee's assertion that the impartial examiner, Dr. George Lewinnek, was biased. (Dec. I, 3.)

and the fact that the shoulder is one of the more fragile parts of the body that has a very precarious blood supply making it prone to degeneration." (Dec. I, 6.) On January 4, 2009, we dismissed the employee's appeal of the first decision, as he failed to file his appellate brief within the prescribed time period.[4] See 452 Code Mass. Regs. § 1.15(5). With the dismissal of the employee's appeal, the fact that his impingement syndrome was not related to his employment became the law of the case.

The employee filed a second claim for compensation based on his December 3, 2002 injury date. His claim was denied at conference and he appealed. (Dec. II, 3.) On July 8, 2009, he underwent a § 11A examination by Dr. Hwa Hsin Hsieh. Dr. Hsieh opined the employee had been diagnosed with rotator cuff tendonitis and impingement syndrome,[5] causally related to the work he performed on December 3, 2002. The doctor further opined the employee's current shoulder pain was due to the impingement. While he agreed that his examination findings were similar to those of Dr. Lewinnek, (Dec. II, 8; Dep. 71-72), he disagreed with Dr. Lewinnek on the causation issue. (Dec. II, 8.) Dr. Hsieh opined the employee's rotator cuff tendonitis and impingement syndrome were causally related to the employee's work injury. (Dec. II, Ex. 1; Dep. 16-19; 27.)[6]

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[4] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] Dr. Hsieh stated the rotator cuff tendonitis and impingement syndrome were not distinct diagnoses, but the "same thing," in that the work injury caused the employee to develop tendonitis, which led to the impingement syndrome. (Dep. 16.)

[6] The judge noted the history Dr. Hsieh relied upon was inconsistent with the employee's testimony that he stopped working in April 2004 due to a general layoff, and that he would have continued to work had he not been laid off. (Dec. II, 7.) Dr. Hsieh thought the employee left his job because he could not do the work. (Dec. II, 7.)

The judge found that the employee's claim was barred by principles of res judicata. He quoted the 2006 hearing decision where the previous administrative judge found that:

> [T]he employee's right shoulder injury of December 3, 2002, had resolved by the time of Dr. Lewinnek's examination of the employee. On November 7, 2005, based upon the adopted opinions of Dr. Lewinnek, I find that the employee's current disability is causally related to his impingement syndrome in his right shoulder; *however, the impingement syndrome was not caused by the employee's injury of December 3, 2002*. The employee has failed to meet his burden of proving causally related disability during the relevant time frame in dispute, i.e., April 1, 2004 to date and continuing.

(Dec. II, 8, quoting Dec. I, 7.)(Emphasis added.) In dismissing the claim, the judge also relied on our decision in Suliveres v. Durham School Serv., 24 Mass. Workers' Comp. Rep. 49 (2010), *aff'd sub nom* Suliveres's Case, 78 Mass. App. Ct. 1126 (2011)(Memorandum and Order Pursuant to Rule 1:28), where we held that principles of res judicata barred an employee's second claim for benefits for a left wrist condition found, in a prior hearing decision, to be unrelated to the employee's work. (Dec. II, 8-9.)

On appeal the employee argues, inter alia, the judge erred by dismissing his claim on res judicata grounds. The gist of the employee's argument is that res judicata does not apply to claims encompassing periods after the prior hearing decision, where there has been a determination of an industrial injury, and the employee can prove a worsening of his condition. The employee attempts to distinguish this case from Suliveres, supra, based on the fact that here, "there was no finding of an absence of initial or original causal relationship." (Employee br. 20.) The employee also cites G. L. c. 152, § 16,[7] in support of his argument that

[7] General Laws c. 152, § 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

res judicata does not apply. (Employee br. 15-18.) We agree with the judge's reliance on Suliveres, and reject the employee's arguments.

We recently iterated the requirements for the application of res judicata in Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. ___ (May 19, 2011):

> 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 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, 176 n.3 (1998). These doctrines apply to workers' compensation proceedings. Martin v. Ring, 401 Mass. 59, 61 (1987).

In Boyden, we affirmed a decision barring an employee's second claim for a psychological incapacity allegedly related to her accepted work-related physical injuries. Ms. Boyden argued that because she was advancing a different legal theory in support of her psychological injury claim, the principles of res judicata did not operate to bar her claim. Id. In dismissing her second claim, the judge disagreed:

> 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

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> 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 the employee . . . may have further hearings as to whether his incapacity . . . is or was the result of the injury for which he received compensation. . . .

> conditions. . . . 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 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.

Id.

This case is not materially different. At the first hearing, the employee failed to establish the existence of a causal relationship between his industrial injury and his impingement syndrome. He then failed to pursue his appeal of that decision. As in Boyden, the employee here attempts to re-litigate an issue already decided adversely to him, to wit: the causal relationship between his work injury and his impingement syndrome. The alleged worsening of the employee's non-work-related condition does not alter the fact that principles of res judicata operate to bar him from relitigating the causation issue. "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." Suliveres v. Durham School Serv., supra at 53 n.8 (2010)(emphasis added). The judge's reliance on Suliveres was proper.

For the reasons expressed in Boyden, we also reject the employee's argument that G. L. c. 152, § 16, permits him to relitigate the causation issue.[8] Finally, the employee may not relitigate the issue of whether the impartial examiner in the first hearing, Dr. Lewinnek, was biased. That argument was advanced and rejected by the judge in the prior hearing decision, which the employee did not successfully appeal. (Dec. I, 3.)

Accordingly, we affirm the decision.

[8] Cf. Lopes v. Lifestream, Inc., 25 Mass. Workers' Comp. Rep. ___ (April 19, 2011) (where judge in first hearing decision found employee suffered a work-related neck injury which had resolved, res judicata did not bar employee from litigating a future claim for incapacity benefits owing to that injury).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **August 25, 2011**