

2006. The WCJ terminated benefits effective May 1, 2006,¹ and made the following relevant findings of fact:

10. The Employee had a work related injury on April 27, 2005, caused by the injury incident which she described. The nature of this injury is a muscular and ligamentous strain of her left hip. . . .

. . . .

12. The Employee was fully recovered from her work injury when she returned to unrestricted work on May 1, 2006. This finding is based upon her lack of restrictions, upon the continuing improvement throughout her treatment as described by her testimony and by the treatment of the physicians who provided treatment, and upon the testimony of Dr. Morgan and Dr. Tyndall that they expected a full recovery.

WCJ's Decision, October 18, 2006, Findings of Fact Nos. 10, 12 at 2-3; Reproduced Record (R.R.) at 4a-5a.

On June 20, 2008, Claimant petitioned to reinstate benefits as of September 26, 2007. On August 29, 2008, Claimant petitioned for benefits and alleged that on March 21, 2008, she suffered a work-related aggravation of a pre-existing hip injury when a patient slipped and fell into her when she moved the patient from the toilet.

Claimant testified that she continued to have pain in the left groin and hip. Notes of Testimony, July 22, 2008, (N.T.) at 9; R.R. at 98a. Claimant testified that when she returned to work on May 1, 2006, she "was feeling probably 75 percent better." N.T. at 10; R.R. at 99a. Claimant said she went back to work

¹ The WCJ also denied Claimant's penalty petition. The penalty petition is not before this Court.

because she was a single parent and needed the money. N.T. at 11; R.R. at 100a. When she returned to work, she rated her pain level at four on a scale of one to ten. Her pain got worse over time. She especially noticed it toward the end of a twelve and one-half hour shift. A pivot movement caused excruciating pain in her hip. N.T. at 12; R.R. at 101a. Claimant experienced pain when she walked on uneven surfaces or climbed stairs. N.T. at 14; R.R. at 103a. Claimant was diagnosed with a labral tear in the hip and was scheduled for arthroscopic surgery. N.T. at 17, 19; R.R. at 106a, 108a. On cross-examination, Claimant admitted that she believed that she never fully recovered from the April 2005, work injury. N.T. at 24; R.R. at 113a.

Claimant presented a report from her treating chiropractor, Paul R. Hetrick, D.C. (Dr. Hetrick). Dr. Hetrick first treated Claimant on February 22, 2007, and diagnosed Claimant with left hip joint dysfunction, reciprocal inhibition of the gluteal muscles of the left buttocks, and sacroiliac joint dysfunction. He reported that a September 26, 2007, MR/arthrogram indicated a posterior labral tear and mild fraying of the anterior superior lateral labrum. Report of Paul R. Hetrick, D.C., June 21, 2009, (Dr. Hetrick Report) at 1; R.R. at 77a.

Dr. Hetrick further explained Claimant's condition:

Although the 3/21/08 incident is not a new injury that specific incident significantly accelerated her need for the subsequent surgical procedure. Again, it is important to go back to my initial evaluation of the patient on 2/22/07, when I originally diagnosed the patient with a left hip dysfunction. At that time, the patient had reciprocal inhibition of the left gluteal muscles. This does not occur until the mechano receptors are shut off to the hip joint

due to the injury that had already existed in that left hip from the original work-related injury on or about 4/27/2005. With that said what Irene had was an unstable hip joint and when the patient fell onto her on 3/21/08 Irene's left hip joint could not be properly stabilized and this again accelerated the injury and the subsequent need for the surgical intervention.

Unfortunately, following the work-related injury of 2005, Irene was walking around, twisting, turning, pivoting, walking on even [sic] surfaces, etc., on a hip joint that was getting progressively worse as there was, first, a labral tear and, secondly, the tear had caused instability into the joint and weakness of the supportive gluteal muscles and finally the injury of 3/21/08.

Dr. Hetrick Report at 2; R.R. at 78a.

Friedrich Boettner, M.D. (Dr. Boettner) examined Claimant on April 22, 2008, and injected Claimant with Lidocaine, Mercaine, and Kenelog. Medical Record from Friedrich Boettner, M.D., April 22, 2008, (Dr. Boettner Report) at 1-3; R.R. at 79a-81a. When the injection provided only temporary relief, Dr. Boettner performed arthroscopic surgery on the hip. The Hospital for Special Surgery Operative Record, September 26, 2008, at 1-5; R.R. at 82a-86a.

Claimant presented the medical report of James N. Rintoul, M.D., (Dr. Rintoul), a treating physician of Claimant. Dr. Rintoul summarized the course of Claimant's treatment and stated, "By May of 2006 Irene was faced with returning to work or losing her job. As she had gotten nothing from Workman's [sic] Compensation at that time, despite reservations of Dr. Morgan she was financially compelled to return to Chambersburg Hospital." Report of James N. Rintoul, M.D., April 10, 2008, at 1; R.R. at 88a.

Employer presented the deposition testimony of Craig W. Fultz, M.D. (Dr. Fultz), a board-certified orthopedic surgeon. Dr. Fultz examined Claimant on September 4, 2008, took a history, and reviewed medical records. Dr. Fultz opined that Claimant suffered from degenerative changes in her hip and that a labral tear, if present, did not cause any of her symptoms. Deposition of Craig W. Fultz, M.D., March 19, 2009, (Dr. Fultz Deposition) at 17; R.R. at 145a. Dr. Fultz further opined that he could not say that the labral tear seen on an MRI “was present or caused by the 4-27-05 injury.” Dr. Fultz Deposition at 18; R.R. at 146a. He also testified within a reasonable degree of medical certainty that Claimant’s labral tear was not caused by her work activities or any specific event at work. Dr. Fultz Deposition at 19-20; R.R. at 147a-148a.

Employer moved to dismiss on the basis that Claimant’s petitions were an attempt to relitigate the original injury and were barred by the doctrine of *res judicata*.

The WCJ denied the motion, granted the reinstatement petition, awarded Claimant benefits from September 24, 2008, through December 1, 2008, when Claimant’s benefits were suspended, and dismissed the claim petition as moot.² The WCJ found Claimant, Dr. Hetrick, Dr. Rintoul, and Dr. Boettner credible. The WCJ did not find Dr. Fultz credible to the extent his opinions contradicted the opinions of Dr. Hetrick, Dr. Rintoul, and Dr. Boettner. The WCJ made the following relevant finding of fact and conclusion of law:

² The WCJ issued two amended orders to correct typographical errors.

8. By Interlocutory Order dated September 12, 2008, Defendant's Motion for Dismissal on grounds of res judicata/collateral estoppel was denied. This Judge found that Claimant is not attempting to re-litigate a prior Termination Decision, but is seeking to prove a recurrence of disability or incurred disability as a result of a labral tear pursuant to an MRI dated after the Termination Order.

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CONCLUSIONS OF LAW

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3. Claimant returned to full duty work, without restrictions, on May 1, 2006. Although Claimant testified that upon her return to work her pain was not completely gone, it is noted that she was able to return to work and perform her job. Claimant provided undisputed testimony that as she continuously worked her 12-hour shifts requiring pushing and pulling of beds, pivoting on the left hip and walking on uneven surfaces, her left hip symptoms and pain progressively worsened. This testimony is corroborated by the medical records and was not disputed by Dr. Fultz, and further serves to meet Claimant's burden of showing a worsening of condition. Claimant has also met her burden of showing that her physical condition has changed since the termination, as evidenced by the objective MRI with contrast of September 26, 2007, which revealed a new finding of a labral tear and anterior fraying. The evidence shows that the tear or fraying was not definitively present at the time of the May 25, 2005 MRI without contrast, which was taken shortly after the work injury occurred. The competent and credible evidence of record relates the labral tear to the work injury as:

1. Dr. Hetrick opined that the April 27, 2005 work injury caused an unstable hip joint and that Claimant's work activities on this unstable hip joint progressively worsened Claimant's left hip condition and caused a labral tear;

2. Dr. Hetrick and Dr. Rintoul opined that the March 21, 2008 work event accelerated Claimant's need for hip surgery; and

3. Dr. Rintoul opined that since returning to work, Claimant's left hip pain became increasingly unbearable.

This Judge is not persuaded by Dr. Fultz's testimony that the labral tear is not work related as the May 24, 2005 MRI did not show a labral tear and therefore was not immediately present after the April 27, 2005 work injury, or that it was due to degenerative changes. Dr. Fultz admitted that Claimant's work activities since her return to work in May of 2006 contributed to Claimant's left hip condition, and further agreed that the 2005 MRI without contrast was not a good tool to diagnose a labral tear. Instead, this Judge credits Dr. Rintoul's opinion that the increased signal intensity noted on the 2005 MRI could be a possible indicator of a labral tear. Claimant's surgical records indicate that no degenerative changes were noted, and Claimant improved with surgery. . . .

WCJ's Decision, February 12, 2010, Finding of Fact No. 8 and Conclusion of Law No. 3 at 1, 7-8; R.R. at 179a, 185a-186a.

Employer appealed to the Board which affirmed. The Board determined that Claimant's reinstatement petition not barred by res judicata or collateral estoppel and that Claimant's medical evidence was competent to support a reinstatement.

Employer contends that the Board erred when it affirmed the grant of the reinstatement petition because the petition was barred by the doctrines of res judicata and collateral estoppel because Claimant's position in the petition to reinstate was inconsistent with the prior determination that Claimant fully recovered from her original injury. Employer also contends that the Board erred

when it affirmed the WCJ because Claimant's medical evidence was not competent to support a reinstatement of benefits.³

Initially, Employer contends that Claimant's petition for reinstatement was barred by the doctrines of collateral estoppel and res judicata because Claimant attempted to relitigate the prior determination that she was fully recovered.

In order to reinstate benefits after a termination of benefits, a claimant must establish a causal connection between the work-related injury and the claimant's current condition. Further, the claimant must prove that the disability has increased or recurred since the termination and that his physical condition has changed. Pieper v. Ametek-Thermox Instruments Division, 526 Pa. 25, 584 A.2d 301 (1990).

In Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmwlth. 2008), appeal denied, 601 Pa. 691, 971 A.2d 494 (2009), this Court recounted the criteria necessary to establish res judicata and collateral estoppel:

Initially, we note that technical res judicata and collateral estoppel are both encompassed within the parent doctrine of res judicata, which 'prevents the relitigation of claims and issues in subsequent proceedings.' Henion [v.

³ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

Workers' Compensation Appeal Board (Firpo & Sons, Inc.), 776 A.2d at 365 [(Pa. Cmwlth. 2001)].

Under the doctrine of technical res judicata, often referred to as claim preclusion, 'when a final judgment on the merits exists, a future suit between the parties on the same cause of action is precluded.' Id. In order for technical res judicata to apply, there must be: '(1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued.' Id. at 366. Technical res judicata may be applied to bar 'claims that were actually litigated as well as those matters that should have been litigated.' Id. 'Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings.' Id.

The doctrine of collateral estoppel often referred to as issue preclusion, 'is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated.' Pucci v. Workers' Compensation Appeal Board (Woodville State Hosp.), 707 A.2d 646, 647-48 (Pa. Cmwlth. 1998). Collateral estoppel applies where:

(1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with the party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment.
Id. at 648.

Weney, 960 A.2d at 954 (emphasis in original and added).

In National Fiberstock Corporation v. Workers' Compensation Appeal Board (Grah), 955 A.2d 1057 (Pa. Cmwlth. 2008), National Fiberstock

Corporation (National) had petitioned to terminate the benefits of Debra Grahl (Grahl) as of October 20, 1997. On March 27, 2002, the WCJ found that Grahl had fully recovered from her work-related injury on October 20, 1997, and granted the termination petition. Grahl appealed to the Board which affirmed. On February 2, 2005, Grahl filed a reinstatement petition and alleged that as of January 3, 2005, she suffered a recurrence of her work-related disability in the nature of a worsening of her condition. National denied the allegations. National Fiberstock, 955 A.2d at 1059.

The WCJ granted the reinstatement petition, and the Board affirmed. National raised the issue of res judicata and asserted that Grahl testified that she continued to have the same symptoms since she stopped working for National in 1994. Because Grahl was found to be fully recovered on October 20, 1997, National contended that Grahl was attempting to relitigate the termination petition. National Fiberstock, 955 A.2d at 1061.

This Court determined that the reinstatement petition was not barred by res judicata:

The ultimate and controlling issue decided in Employer's [National] termination petition was whether Claimant [Grahl] was fully recovered from her work-related injury, and she was found to be fully recovered as of October 20, 1997. The ultimate controlling issue in Claimant's [Grahl] reinstatement petition, the matter before us, is whether her work injury recurred as of January 3, 2005. These issues are not identical because they involve factual questions about Claimant's [Grahl] condition at two unrelated time periods. In short, Claimant's [Grahl] reinstatement petition is not barred by res judicata or collateral estoppel.

National Fiberstock, 955 A.2d at 1061-1062.

Here, one of the issues determined in the original petition was that Claimant's benefits were terminated as of May 1, 2006. She sought reinstatement of benefits due to a recurrence of her work-related disability as of September 26, 2007. As in National Fiberstock, the termination and the reinstatement involve factual questions concerning Claimant's condition at two different periods in time. Under the reasoning of National Fiberstock, Claimant's reinstatement petition was not barred by res judicata. However, this Court's inquiry does not end there.

Employer asserts that Claimant and her medical witnesses failed to recognize Claimant was found fully recovered when the termination petition was granted. She is attempting to impermissibly relitigate that issue.

In Huynh v. Workers' Compensation Appeal Board (Hatfield Quality Meats), 924 A.2d 717 (Pa. Cmwlth. 2007), Chinh Huynh (Huynh) suffered work-related head and rib injuries in the course of his employment with Hatfield Quality Meats (Hatfield). Hatfield began paying Huynh workers' compensation benefits though it did not immediately issue a notice of compensation payable. On January 14, 1998, Hatfield filed a utilization review request and challenged the reasonableness and necessity of Huynh's chiropractic treatment. The utilization review organization ruled in Hatfield's favor. Huynh petitioned for review. Shortly thereafter Huynh petitioned for benefits and alleged that he suffered a loss of hearing in his right ear as a result of the work-related accident. Hatfield petitioned to terminate benefits and alleged that Huynh had fully recovered from

his injuries and was capable of returning to work with no loss of earning power. The Workers' Compensation Judge consolidated the petitions. In a decision circulated on January 31, 2001, the Workers' Compensation Judge denied Huynh's challenge to the utilization review determination and Huynh's claim petition and granted Hatfield's termination petition as of May 7, 1998. Huynh, 924 A.2d at 718-719.

On or about April 16, 2001, Huynh petitioned to reinstate benefits. At hearing Huynh in essence stated that he was seeking a reinstatement of benefits relating to disability as a result of a head injury from which full recovery was never established and which the Workers' Compensation Judge never acknowledged. Huynh submitted no new medical testimony. The Workers' Compensation Judge granted the reinstatement petition. Hatfield appealed to the Workers' Compensation Appeal Board which reversed on the basis that Huynh's reinstatement petition was actually an attempt to relitigate the earlier unappealed termination and that Huynh failed to meet his burden under Pieper. Huynh, 924 A.2d at 719-721.

Huynh petitioned for review with this Court which affirmed:

As the Board properly pointed out in its opinion reversing the WCJ's grant of the reinstatement petition, the issue of whether Claimant [Huynh] was fully recovered from his 1997 work-related injuries was fully and finally adjudicated in Employer's [Hatfield] favor in the WCJ's decision circulated on January 31, 2001. The doctrine of res judicata/collateral estoppel precludes Claimant from revisiting this issue in the form of her current reinstatement petition.

Huynh, 924 A.2d at 723.

Here, it is undisputed that the WCJ in the original termination proceeding determined that Claimant was fully recovered when she returned to work on May 1, 2006. Claimant did not appeal this determination. If she believed that she returned to work at no loss of earnings even though she still was injured and not fully recovered, Claimant could have appealed the WCJ's decision terminating benefits and argued that benefits should have been suspended. Claimant did not do so.

On cross-examination, Claimant testified that she believed that she never recovered from the original injury. N.T. at 24; R.R. at 113a. In his report Dr. Hetrick testified that Claimant was originally injured on April 27, 2005, and “[f]rom that point on she continued to have pain in that region [her hip and groin] until receiving appropriate treatment by Dr. Boettner on 9/26/2008. . . .” Dr. Hetrick Report at 1; R.R. at 77a. Dr. Boettner stated “After about a year, she [Claimant] had to return to work to not lose her job. She was unable to sign up for the job with limitations; therefore, she had to go back without any restrictions. At that time she was working day to day, having pretty significant pain until today.” Dr. Boettner Report at 1: R.R. at 79a.

Dr. Rintoul stated in his report:

By May of 2006 Irene was faced with returning to work or losing her job. As she had gotten nothing from Workman's [sic] Compensation at this time, despite reservations of Dr. Morgan she was financially compelled to return to Chambersburg Hospital. By

January 2007 her left hip pain had become increasingly unbearable.

Dr. Rintoul Report at 1; R.R. at 88a.

From this testimony it is clear that Claimant and her medical witnesses did not accept the fact that the WCJ determined that Claimant was fully recovered when he terminated benefits in the original proceeding. As in Huynh, Claimant attempted improperly to relitigate the termination petition in her reinstatement petition. The doctrine of res judicata precludes Claimant from revisiting the issue of whether benefits should have been terminated in a subsequent reinstatement petition.

When the WCJ granted the reinstatement petition, he declared the claim petition moot. In the claim petition, Claimant alleged that that on March 21, 2008, she suffered a work-related “aggravation of a pre-existing left groin and left hip condition, including a labral tear and anterior fraying” when she was “getting a patient off the toilet and the patient slipped and fell against me, pushing me against the bathroom sink.” Claim Petition, August 29, 2008, at 1. The WCJ did not consider the claim petition on its merits because he granted the reinstatement petition. Because this Court has determined that the WCJ erred when he granted the reinstatement petition, this Court reverses the grant of the reinstatement petition, and this case is remanded to the Board with instructions to remand to the WCJ for consideration of the claim petition.

BERNARD L. MCGINLEY, Judge

