STATE OF MICHIGAN

COURT OF APPEALS

EVELYN R. THORNTON, Plaintiff-Appellant,	UNPUBLISHED March 9, 2001
v	No. 208469 WCAC
A & P STORES, Defendant-Appellee.	LC No. 94-000257 ON REMAND

Before: Jansen, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

This case is on remand from the Supreme Court for reconsideration in light of *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). We have been further instructed to consider plaintiff's arguments in her motion to dismiss, which was filed in the Supreme Court after defendant filed its application for leave to appeal. See 463 Mich 939 (2000).

I. FACTS AND PROCEDURAL HISTORY

Plaintiff began working for defendant on November 11, 1975, stocking shelves. This job required plaintiff to lift fifty or more pounds and to bend and reach items on shelves. After six years, plaintiff became a cashier, which also required plaintiff to lift grocery bags of up to twenty pounds to place them in the shopping cart. In approximately 1987, plaintiff began having difficulty with asthma, although it did not seem to affect her job duties. In March or April of 1991, however, plaintiff began experiencing pain in her chest while she was on the job. Plaintiff stated that the repetitive movements of her job brought on the pain, but that the pain subsided when she was not working. In July 1991, plaintiff sought treatment for the chest pain, and was prescribed medication for the pain.

Plaintiff continued to work until March 22, 1992, but stopped working because the pain in her chest became too severe and no longer subsided when she stopped working after her shift. She remained off work until June 8, 1992, when she attempted to return to work, but was able to work only two hours until "shooting pains" in her chest prevented her from completing her shift. Plaintiff has not been able to work since June 8, 1992.

Plaintiff's petition for worker's compensation benefits was filed on June 22, 1992, alleging injury dates of July 2, 1991, March 2, 1992, and June 13, 1992. She alleged a disability to her chest and ribs as the result of constant and repetitive lifting, and that she was exposed to allergens that contributed significantly to her asthma.

Proceedings were held before the magistrate on November 23, 1993. Three physicians testified by way of deposition. Leonard Schreier, M.D., a board certified internist and allergist, first treated plaintiff on July 28, 1987, for bronchial asthma. In 1989, he diagnosed plaintiff with costochondritis, an inflammation of the area where the bone and cartilage part of the rib come together near the sternum. Dr. Schreier testified that plaintiff's pain was aggravated by deep breathing, such as when she lifted grocery bags. He concluded that plaintiff's work aggravated the costochondritis and prevented plaintiff from performing her job. Dr. Schreier did not believe that plaintiff would be able to return to her job as a cashier, and his prognosis was that she would have recurrent problems with her chest wall.

Timothy Laing, M.D., a board certified rheumatologist, saw plaintiff on June 2, 1993, and until December 1993. Dr. Laing also diagnosed plaintiff as having costochondritis and testified that there had been no significant changes in her condition or her symptoms between June and December 1993. Dr. Laing stated that plaintiff's job might contribute to or aggravate plaintiff's condition in that the extensive use of her upper extremities with repetitive action, particularly lifting and moving heavy weights, could make the pain of the costochondritis to be worse. Dr. Laing testified that plaintiff's job would aggravate her condition. He also testified that plaintiff would be unable to perform her duties as a cashier without experiencing a considerable degree of pain and that she would be disabled from other jobs that similarly required extensive and repetitive use of the upper extremities. Dr. Laing's prognosis was that plaintiff would eventually recover.

Steven Gross, D.O., board certified in physical medicine and rehabilitation, examined plaintiff on Febraury 25, 1993. He agreed that plaintiff has costochondritis, although he did not believe that there was any direct causal relationship between plaintiff's work activities and the costochondritis. Dr. Gross did state that plaintiff's employment activities could have exaggerated her discomfort.

The magistrate, in a decision mailed on April 14, 1994, accepted the testimony of Dr. Schreier and Dr. Laing over that of Dr. Gross. The magistrate was not convinced that plaintiff had proven that her employment caused her costochondritis by a preponderance of the evidence, but did find that plaintiff's condition was aggravated by the repetitive lifting and bending required in her job. The magistrate also found, based on Dr. Schreier's testimony, that plaintiff's condition prevented her from returning to work or to any other type of work requiring lifting or repetitive motion involving the upper chest wall and that plaintiff was totally disabled and entitled to an open award of benefits, with an average weekly wage of $326.01.

Defendant appealed to the WCAC, which issued its decision on July 5, 1996. The WCAC found that there was no substantial evidence to support the grant of an open award of benefits. The WCAC concluded that plaintiff's inability to return to work was due to her non-work related costochondritis, not due to any continuing aggravation of her costochondritis caused by her "long since ended work activities." The WCAC stated that plaintiff was entitled to

benefits for a closed period, which it determined must be closed as of October 26, 1992, when Dr. Schreier noted an abatement in plaintiff's symptomology. The WCAC also concluded that plaintiff's average weekly wage had been miscalculated because the magistrate erred in including holiday and vacation pay as discontinued fringe benefits. The WCAC reduced plaintiff's average weekly wage to $309.09.

Plaintiff initially filed an application for leave to appeal to this Court, which was denied in an order dated January 10, 1997. Plaintiff then sought leave to appeal in the Supreme Court, which remanded the case to this Court for consideration as on leave granted on December 23, 1997. In an unpublished opinion issued on September 7, 1999, we reversed the order of the WCAC and reinstated the magistrate's decision. Defendant then sought leave to appeal in the Supreme Court. Defendant later moved for peremptory reversal and plaintiff moved to dismiss the application for leave to appeal on the basis of res judicata. The Supreme Court, in an order dated December 27, 2000, remanded the case for reconsideration in light of *Mudel*. The Court denied the motions for peremptory reversal and to dismiss, but directed this Court to consider plaintiff's arguments in her motion to dismiss.

II. RES JUDICATA

In her motion to dismiss, plaintiff argues that defendant's application for leave to appeal to the Supreme Court was precluded by the doctrine of res judicata. Plaintiff explains that during the pendency of these appeals, defendant filed three petitions to stop benefits.[1] The petition to stop with which we are concerned was filed by defendant on May 16, 1996, and the hearing date was April 19, 2000. The magistrate's opinion is signed on June 14, 2000. The magistrate denied defendant's petition to stop benefits based on consideration of the depositions of Dr. Schreier and Adel El-Magrabi, M.D., board certified in physical medicine and rehabilitation. Dr. El-Magrabi examined plaintiff on April 2, 1996, on behalf of defendant. He agreed that plaintiff has costochondritis and asthma, but believed that plaintiff had recovered from any work-related aggravation of her costochondritis. Dr. Schreier, on the other hand, testified that there was no change in plaintiff's costochondritis condition from 1990 to the present. He testified that the costochondritis was definitely related to plaintiff's employment and that plaintiff remains disabled from her job. The magistrate accepted the testimony of Dr. Schreier, who has treated plaintiff for many years. Consequently, the magistrate found that "defendant has failed to establish that the plaintiff's condition has improved or changed to the extent that she no longer suffers from a work related disability."

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). A second action is barred when: (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first action, and (3) both actions involve

[1] The dates of the petitions to stop are not clear. According to plaintiff, the first petition to stop was denied by the magistrate, appealed to the WCAC, and remanded to the magistrate. The second petition to stop was denied by the magistrate and not appealed. The third petition to stop was pending before a magistrate. Plaintiff contends that the second petition to stop is the final decision that precludes the position taken by defendant on appeal.

the same parties or their privies. *Id.* The question whether res judicata bars a subsequent action is a question of law that is reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co,* 460 Mich 372, 379; 596 NW2d 153 (1999).

The gist of plaintiff's argument is that because the magistrate found in June 2000 that defendant failed to establish that plaintiff's condition has changed to the extent that she no longer suffers from a work-related disability, defendant is barred from taking the position that plaintiff's work-related disability ended in October 1992. First, res judicata applies to quasi-judicial administrative decisions. *Wayne Co v Detroit,* 233 Mich App 275, 277; 590 NW2d 619 (1998). More specifically, as stated by our Supreme Court:

> The concerns behind the res judicata principle—economy of judicial resources and finality of litigation—apply equally to workers' compensation proceedings and other actions. [*Gose v Monroe Auto Equipment Co,* 409 Mich 147, 159; 294 NW2d 165 (1980).]

Moreover, there is a final determination on the merits made by the magistrate that plaintiff continues to have a work-related disability, as of June 2000. Defendant has not appealed this determination and both actions (plaintiff's petition filed on June 22, 1992, and defendant's petition filed on May 16, 1996) involve the same parties and the same fundamental issue, namely, whether plaintiff suffered a work-related disability and of what duration. See *id.,* p 162 ("Central to any application of the res judicata rule . . . is the principle that one may not relitigate the identical question once determined."). Further, it is of no import that the first action to be determined finally was the second action to be commenced; rather, the first final judgment rendered is that which becomes conclusive and res judicata. See *Brownridge v Michigan Mutual Ins Co,* 115 Mich App 745, 750-751; 321 NW2d 798 (1982); *Westwood Chemical Co v Kulick,* 656 F2d 1224, 1227 (CA 6, 1981). Consequently, the magistrate's ruling on June 14, 2000, a final and unappealed ruling, that defendant failed to establish that plaintiff's condition has improved or changed to the extent that she no longer suffers from a work-related disability is res judicata and precludes defendant's contention that plaintiff's disability ended in October 1992.[2]

Accordingly, we remand this case to the WCAC for an award of benefits in conformance with the June 14, 2000, decision of the magistrate. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald

[2] As noted by plaintiff, "[t]o hold otherwise would lead to inconsistent opinions both of which would be considered final and enforceable."