

STATE OF MICHIGAN
COURT OF APPEALS

ANNMARIE NILL,

Plaintiff-Appellee,

v

BORDERS GROUP, INC., and LIBERTY
MUTUAL INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
December 20, 2011

No. 298446
WCAC
LC No. 09-000229

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendants appeal from an opinion and order of the Workers' Compensation Appellate Commission (WCAC) that reversed a magistrate's order dismissing plaintiff's claim for benefits on the basis of *res judicata*. This Court originally denied defendants' application for leave to appeal, *Nill v Borders Group, Inc.*, unpublished order of the Court of Appeals, entered January 20, 2011 (Docket No. 298446), but the Supreme Court, in lieu of granting leave to appeal, subsequently remanded the case to this Court for consideration as on leave granted. *Nill v Borders Group, Inc.*, 489 Mich 939; 798 NW2d 215 (2011). We affirm.

Plaintiff was injured at work on January 24, 2002. Defendants voluntarily paid benefits, but stopped paying benefits after plaintiff refused her employer's offer to return to work. In proceedings before Magistrate Susan Cope in 2003, the parties stipulated that plaintiff had sustained an injury that arose out of her employment, but disagreed concerning whether plaintiff remained disabled. In August 2003, Magistrate Cope decided that plaintiff lacked credibility and awarded benefits only until the date that Dr. Terry Weingarden concluded that she could return to work without restrictions. The WCAC affirmed, but corrected the date of Dr. Weingarden's examination specified in the magistrate's opinion. In June 2007, plaintiff filed an application for mediation or hearing and claimed there had been a "change in condition." She alleged that she "continued to be disabled, leading to subsequent worsening of her condition" and necessitating surgery. In this second proceeding, defendants argued, and Magistrate Victor McCoy agreed, that the application was barred by *res judicata*. Plaintiff appealed to the WCAC, which concluded that the magistrate committed legal error in his analysis and reversed the dismissal of plaintiff's claim.

Application of the doctrine of res judicata presents a question of law. *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229; 720 NW2d 756 (2006). This Court reviews de novo questions of law involved in a final order of the WCAC. *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 4; 760 NW2d 586 (2008). The WCAC's decision may be reversed if the WCAC "operated within the wrong legal framework or based its decision on erroneous legal reasoning." *Id.*

"The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies." *Paige v City of Sterling Hts*, 476 Mich 495, 521 n 46; 720 NW2d 219 (2006). The Supreme Court has quoted with approval the following passage from 58 Am Jur, Workmen's Compensation, § 508:

The general rule with respect to the effect upon the application of the principles of res judicata to decisions under workmen's compensation acts, of a provision authorizing the modification of an award upon a showing of a change in the employee's condition, is that a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time, but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed. [*Gose v Monroe Auto Equip Co*, 409 Mich 147, 160-161; 294 NW2d 165 (1980) (internal citations and quotation marks omitted; emphasis removed).]

"[A] claimant may later raise a different claim or modify an existing award if the employee's physical condition worsens." *Banks*, 271 Mich App at 230.

Defendants argue that plaintiff could not rely on a purported change in her degenerative disc condition because no finding was made that plaintiff's degenerative disc disease was caused or aggravated by the work-related incident. However, Magistrate Cope also did not make a finding that this condition was *not* caused or aggravated by the work accident. Magistrate Cope did not make findings concerning this condition and link, perhaps because defendants had stipulated that plaintiff sustained an injury that arose out of her employment. If Magistrate Cope had found that plaintiff's complaints of pain were attributable to degenerative disc disease and that that disease was not caused by or aggravated by the accident, then defendants' argument that res judicata bars her from relitigating causation may have had merit. Again, though, Magistrate Cope did not make a finding concerning the relationship between the accident and plaintiff's degenerative disc condition. Therefore, defendants' argument that res judicata precludes plaintiff from litigating that link is flawed.

Defendants additionally argue that "[o]nce a claimant has been found to have 'recovered' from the work-related injury . . . there cannot be a later change in condition as a matter of law under the principles of *res judicata*." Defendants rely on *Bent v Davis Tool & Engineering*, 2000 ACO 338, in support of their argument. We disagree that application of the *Bent* analysis requires reversal here. In that case, Magistrate Stephen Oldstrom relied, at least in part, on a

factual determination concerning the lack of a causal link between the plaintiff's current condition and the work accident and did not focus *solely* on res judicata principles. *Id.* at 4. Moreover, the WCAC did not explicitly endorse Magistrate Oldstrom's analysis alluding to res judicata. *Id.* at 5. The WCAC focused in large part on the magistrate's *factual determination* that the plaintiff's symptoms were not related to the work injury. *Id.*

As explained in 8 Larson, Workers' Compensation Law, § 131.03[2][b], p 131-35, a proceeding to determine if there has been a change of condition does not allow the claimant or the employer to retry issues decided in the original proceeding, such as the connection between the accident and the disability, the "employer-employee status, occurrence of a compensable accident, and degree of disability at the time of the first award." However,

[i]t is almost too obvious for comment that res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases. A moment's reflection would reveal that otherwise there would be no such thing as reopening for a change in condition. [7 Larson, Workers' Compensation Law, § 127.07[7], p 127-41.]

Plaintiff's current application seeks benefits based on a theory that plaintiff's physical condition has changed and is now disabling. The WCAC correctly determined that res judicata does not apply.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter