IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elizabeth Murphy, Petitioner	:	
v.	:	No. 1159 C.D. 2007
	:	Submitted: November 2, 2007
Workers' Compensation Appeal Board (University of Pennsylvania), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: January 24, 2008

Elizabeth Murphy (Claimant) petitions for review from an Order of the Workers' Compensation Appeal Board (Board) that affirmed the Decision of the Workers' Compensation Judge (WCJ) granting a Petition for Physical Examination or Expert Interview of Employee filed by the University of Pennsylvania (Employer). We affirm.

Section 306(a.2) of the Pennsylvania Workers' Compensation Act[1] (Act), added by the Act of June 24, 1996, P.L. 350, 77 P.S. §511.2, provides, in pertinent part:

> (1) When an employee has received total disability compensation...for a period of one hundred four weeks, unless otherwise agreed to, the employee shall be required to submit to a medical examination which shall

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2626.

> be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment due to the compensable injury, if any...
>
> (2) If such determination results in an impairment rating that meets a threshold impairment rating that is equal to or greater than fifty per centum impairment under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment," the employee shall be presumed to be totally disabled and shall continue to receive total disability compensation benefits under clause (a). If such determination results in an impairment rating less than fifty per centum impairment under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment," the employee shall then receive partial disability benefits under clause (b)…
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> (5) Total disability shall continue until it is adjudicated or agreed under clause (b) that total disability has ceased or the employee's condition improves to an impairment rating that is less than fifty per centum of the degree of impairment defined under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment."
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> (6) Upon request of the insurer, the employee shall submit to an independent medical examination in accordance with the provisions of section 314 to determine the status of impairment: Provided, however, That for purposes of this clause, the employee shall not be required to submit to more than two independent medical examinations under this clause during a twelve-month period.

In Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 814 A.2d 884 (Pa. Cmwlth. 2003), affirmed, 585 Pa. 366, 888 A.2d 758 (2005), this Court held that when an employer fails to make a request for an

impairment rating evaluation (IRE) within sixty days of the date claimant received her 104th week of temporary total disability, it is thereafter precluded from making her submit to an IRE. The Supreme Court affirmed agreeing that the failure to request an IRE within the sixty day window effectively precludes an employer from obtaining the automatic relief set forth in Section 306(a.2)(2) of the Act. Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 382, 888 A.2d 758, 767 (2005). Nonetheless, it held that an employer that does not comply with the timeframe established by Section 306(a.2)(1) is not prohibited from requesting that an claimant submit to an IRE at a later time. The Court explained that 306(a.2)(6) of the Act permits an employer to request that a claimant submit to an IRE although the results are not self-executing as they are in subsection (2). Rather, the employer must proceed with the results through the traditional administrative process. Id. at 382, 888 A.2d at 768. With this legal backdrop in mind, we turn to the case presently before us.

Claimant sustained an injury in the course and scope of her employment on July 5, 1996. On September 18, 2002, she underwent an IRE per Employer's request. On June 19, 2003, Claimant filed a Review/Modification/Reinstatement Petition alleging that Employer improperly requested and performed an IRE "in contravention of the Act" and seeking that the results of the examination be "stricken and declared a nullity." The WCJ granted Claimant's Petition on March 24, 2004 consistent with this Court's opinion in Gardner.

On July 17, 2006, Employer filed a Petition for Physical Examination or Expert Interview of Employee alleging that Claimant refused to submit to an IRE to be done by Yutong Zhang, M.D. on July 5, 2006. By a Decision circulated

October 3, 2006, the WCJ granted its Petition relying on the Supreme Court's opinion in Garder and directed Claimant to submit to an IRE performed by Dr. Zhang at a day and time arranged by the parties. The Board affirmed in an Order dated May 29, 2007. This appeal followed.[2]

Claimant argues on appeal that the WCJ erred in granting Employer's Petition and that res judicata precludes an order directing her to attend an IRE. We disagree.

The doctrine of res judicata prevents the relitigation of claims and issues in subsequent proceedings. Henion v. Workers' Compensation Appeal Board (Firpo & Sons), 776 A.2d 362 (Pa. Cmwlth. 2002). Res judicata is composed of two distinct principles termed technical res judicata, otherwise known as claim preclusion, and collateral estoppel, also known as issue preclusion. Id. at 365. Technical res judicata dictates that when a final judgment on the merits exists, a future suit between the same parties on the same cause of action is precluded. Id. It applies when the following four factors are all present: (1) identity of the subject matter; (2) identity of the cause of action; (3) identity of the parties to the action; (4) identity of the quality of the parties suing or being sued. Maranc v. Workers' Compensation Appeal Board (Bienenfeld), 751 A.2d 1196, 1199 (Pa. Cmwlth. 2000).

Collateral estoppel prohibits the litigation in a later cause of action of issues of law or fact that were actually litigated and necessary to a previous final judgment. Henion, 776 A.2d at 365. This Court, in Borough of Prospect v. Bauer,

[2] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007).

715 A.2d 1244 (Pa. Cmwlth. 1998), referencing Section 28(2) of the Reinstatement (Second) of Judgments (1982), stated that relitigation of an issue is not prohibited "when the issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." See also Keystone Water Co.-White Deer Dist. v. Public Utility Commission, 474 A.2d 368 (Pa. Cmwlth. 1984).

Technical res judicata does not apply to preclude the grant of Employer's IRE request because there is not identity of the cause of action. Maranc. In the unappealed Decision of 2003, the WCJ adjudicated Claimant's Review/Modification/Reinstatement Petition. The current litigation, however, commenced with Employer's filing of Petition for Physical Examination.

Collateral estoppel may appear to prevent Employer from seeking an IRE because it does seem that the issue of whether Employer can request an IRE after the sixty-day window following Claimant's receipt of 104 weeks of total disability has been previously answered in the negative. Nonetheless, we note that the WCJ's 2004 Decision was issued without the benefit of the Supreme Court's opinion in Gardner.[3] Gardner clarifies that Section 306(a.2) of the Act, when read as a whole, permits an Employer to seek a later IRE although it must then seek relief through the administrative process in the event the medical examiner finds an impairment level below fifty percent.[4] Consistent with Bauer and Keystone

[3] It is of further interest that Employer did not have the benefit of the Supreme Court's Opinion in Gardner at the time it elected not to appeal the WCJ's 2004 Decision.

[4] Claimant relies on Theile, Inc. v. Workmen's Compensation Appeal Board (Younkers), 586 A.2d 489 (Pa. Cmwlth. 1991) for the proposition that, pursuant to res judicata, a subsequent change in the judicial view of the law has no effect on the finality of a prior adjudication. While
(Footnote continued on next page…)

Water, collateral estoppel does not preclude a finding that Employer may request Claimant to submit to an IRE in the current matter in order to take in account a change in decisional law in order to avoid inequitable administration of the laws. Consequently, the WCJ did not err in granting Employer's Petition. Accordingly, the Decision of the Board is affirmed.

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JIM FLAHERTY, Senior Judge

(continued…)

Claimant provides a correct recitation of the law as set forth in Theile, we disagree that it is of benefit to her in this instance. We note that in no way are we reviving the impairment rating established at examination on September 18, 2002 or questioning the validity of the WCJ's 2003 grant of Claimant's Review/Modification/Reinstatement Petition. That Decision was not appealed and remains in full effect. Nonetheless, while Employer may not enjoy the right to self-executing relief resulting from an impairment rating below fifty percent following a request for an IRE within sixty days of Claimant's receipt of 104 weeks of disability, it is not prohibited from obtaining a later IRE and pursuing relief through the administrative process.

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O R D E R

AND NOW, this 24th day of January, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge