BRB No. 00-570

RICKEY T. PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits, Order Granting Motion for Reconsideration and Vacating Decision and Order Granting Benefits, and Decision and Order on Reconsideration Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter), Norfolk, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McATEER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits, Order Granting Motion for Reconsideration and Vacating Decision and Order Granting Benefits, and Decision and Order on Reconsideration Denying Benefits (93-LHC-0179, 99-LHC-0311, 99-LHC-0312) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a work-related injury to his right knee on April 23, 1991. He

underwent knee surgery on October 8, 1991. Emp. Ex. 6 at 2. Dr. Nevins assessed a 40 percent permanent partial disability rating to the right leg and imposed permanent restrictions. Employer paid benefits for permanent partial disability under the schedule for the right leg impairment. Claimant continued to experience problems with his right knee and filed a claim for a cumulative injury to the right leg. He underwent arthroscopic knee surgery on his right knee on September 24, 1997. Emp. Ex. 6. Claimant's average weekly wage was $432.51 at the time of the 1991 right knee injury, and his weekly earnings on August 13, 1997, were $522.98.

In the fall of 1997 claimant began experiencing progressive problems with his left knee. Dr. Kona diagnosed patella alta, a congenital defect involving an abnormally high riding kneecap, and found evidence of degenerative changes. Cl. Ex. 5 at 7. Claimant filed a claim for benefits under the Virginia Workers' Compensation Act for a left knee injury on December 28, 1998, seeking temporary total disability benefits from October 16, 1998, through December 11, 1998. Claimant also sought compensation under the Longshore Act for the right knee problems based on his 1997 earnings, and compensation for the left knee condition based on his earnings in 1998, on the theory that he sustained new or cumulative injuries to both of his knees.

In a decision dated August 31, 1999 (August 1999 decision), the administrative law judge found that claimant's current right knee problems are the result of the natural progression of his 1991 injury and that claimant's compensation benefits for disability to the right knee should be based on his 1991 average weekly wage. With respect to claimant's left knee injury, the administrative law judge gave preclusive effect to a July 9, 1999, determination of the Virginia Workers' Compensation Commission that claimant's left knee condition was the result of the right knee injury. In his decision on reconsideration dated September 24, 1999, however, the administrative law judge vacated his prior finding that the state determination is to be given collateral estoppel effect. In a Decision and Order on Reconsideration Denying Benefits, dated February 15, 2000, the administrative law judge found that claimant's left knee condition is not work-related based on his consideration of the evidence of record, and he denied claimant compensation for that condition.

On appeal, claimant argues that the administrative law judge erred in finding that claimant's right knee condition is due to the natural progression of his 1991 knee injury rather than a new cumulative injury which he sustained on August 13, 1997. Claimant thus avers that the administrative law judge erred in finding claimant's 1991 average weekly wage applicable to the benefits due for this injury. Claimant also contends that the administrative law judge erred in finding that he did not sustain a work-related left knee injury, or, in the alternative, in failing to give collateral estoppel effect to the state finding that his left knee condition is a compensable consequence of the 1991 right knee injury. Employer responds, urging affirmance of the administrative law judge's findings.

Claimant initially argues that his current right knee condition is due to the aggravation of, or cumulative effect on, his prior condition due to his continuing to work with employer, and thus is not the result of the natural progression of the original injury. Claimant therefore contends that the administrative law judge improperly determined that benefits for this condition are payable based on claimant's 1991 average weekly wage.

Once, as here, claimant establishes his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, it drops from the case, and claimant bears the burden of establishing the work-relatedness of his condition. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). A work-related aggravation of a prior injury is considered to be a new injury under the Act, and is compensable based on claimant's average weekly wage at the time of the aggravating event. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *see also Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991).

We reject claimant's contention that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, and in finding, based on a weighing of the relevant evidence, that claimant's right knee condition is due to the natural progression of the 1991 injury. The administrative law judge properly found that employer rebutted the Section 20(a) presumption with Dr. Nevins's unequivocal opinion that the right knee problems were not caused by a new injury in August 1997. *See generally Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); Emp. Ex. 6 at 2.

Upon weighing the evidence as a whole, the administrative law judge relied on Dr. Nevins's opinion as well as on Dr. Kona's statement that claimant's present knee condition is related to the original injury. Emp. Ex. 5. The administrative law judge thus determined that claimant did not carry his burden in establishing that he sustained a new injury to his right knee. Contrary to claimant's assertion, the mere fact that Dr. Nevins imposed additional restrictions on December 11, 1997, Cl. Ex. 4c, does not necessarily support claimant's position that he sustained a new injury in 1997, as additional restrictions are not incompatible with the natural progression of the 1991 injury. *See* Emp. Ex. 6 at 1-3. As substantial evidence supports the administrative law judge's determination that claimant's right knee disability results from the natural progression of claimant's April 23, 1991, injury, we affirm his conclusion in this regard. *See Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34

BRBS 91 (CRT) (4th Cir. 2000). Accordingly, we affirm the administrative law judge's award of benefits based on claimant's average weekly wage at time of his 1991 knee injury. *See Del Vacchio*, 16 BRBS at 193.

With respect to claimant's left knee problems, the administrative law judge, in reversing his initial decision, found that collateral estoppel does not apply to the finding in the state forum that claimant's left knee injury is causally related to his employment. On appeal, claimant contends that the administrative law judge erroneously determined that collateral estoppel is not applicable to this issue.[1] Under the principle of collateral estoppel, a party is barred from relitigating an issue decided in prior litigation if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior forum; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *Plourde v. Bath iron Works Corp.,* 34 BRBS 45 (2000); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). In order for collateral estoppel effect to be given to a finding of fact by a prior forum, the same legal standards must be applicable in both forums. *See, e.g., Casey v. Georgetown University Medical Center*, 31 BRBS 147, 151 (1997). Collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 21, 31 BRBS 109, 111(CRT) (1st Cir. 1997); *Plourde*, 34 BRBS 45.

Claimant argues that the state finding regarding the causal relationship between the left knee injury and claimant's employment should have been given collateral estoppel effect because the same legal standards are applicable in both forums. Under the Virginia law, claimant bears the burden of establishing by a preponderance of the evidence that he sustained "an injury by accident" arising out of and in the course of employment. Va. Code Ann. §65.2-101. This is the same burden borne by claimant in proceedings under the Longshore Act, once, as here, the Section 20(a) presumption is rebutted. *See Casey*, 31 BRBS at 151. In finding claimant's left knee condition related to the right knee injury, the state district commissioner applied the doctrine of compensable consequences, which provides that "'[w]hen the primary injury is shown to have arisen out of and in the course of

[1]As with the right knee, claimant maintained that he sustained a new injury to his left knee in 1998. The administrative law judge rejected this argument In view of our disposition of this issue, we do not have to review the administrative law judge's finding concerning this matter.

employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct,'" *Bartholow Drywall v. Hill*, 407 S.E.2d 1, 3 (Va. 1991)(citations omitted), and he concluded, crediting Dr. Kona's opinion over that of Dr. Cohn, that claimant's left knee condition is, in fact, a compensable consequence of the right knee injury. State Opinion at 6. Likewise, under the Longshore Act, employer is liable for the natural and unavoidable results of the original work injury. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992). The mere fact that the two forums utilize the same standards and burdens of proof, however, does not end the inquiry into whether collateral estoppel applies to the findings of the initial forum.

Claimant ultimately was denied benefits in the state forum because he failed to establish that he made a reasonable effort to find suitable work. In reversing his own prior finding that collateral estoppel precluded relitigation of the state's determination of the causal relationship between the left knee condition and claimant's work-related right knee injury, the administrative law judge based his conclusion on the ground that the ruling on causation in the state proceeding was not "necessary" to the final outcome there in that the judgment in favor of employer rested on claimant's failure to establish another element of his claim. The doctrine of collateral estoppel may apply to preclude relitigation of an issue actually litigated in the prior case where the determination of that issue was a critical and necessary part of the judgment in the prior action. *See, e.g.*, *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 31 BRBS 201(CRT) (4th Cir. 1998); *Figueroa*, 45 F.3d at 315; *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 96 (1996); *Weber v. S.C. Loveland Co.*, 28 BRBS 321, 325 (1994).

Of the "necessarily decided" element of issue preclusion, one treatise says: "Application of the necessity principle is most clearly illustrated by findings that are contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, §4421 at 199 (1981) (Wright, Miller & Cooper). The general rule is that "a determination adverse to the winning party does not have preclusive effect." *Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068, 1069-1070 (9th Cir. 1985). Preclusive effect is not given where a court's finding of a factual issue is at odds with the court's conclusion. *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995). *But see Garcy Corp. v. Home Ins. Co.*, 496 F.2d 479, 483 (7th Cir. 1974), *cert. denied*, 419 U.S. 843 (1974) (preclusive use of finding contrary to judgment).

At first blush, the finding at the state level that claimant's left knee condition is work-related would seem to conduce to a judgment that he is entitled to compensation, and thus is

contrary to the ultimate judgment, which was a denial of benefits. This view, however, is too simplistic given the fundamental nature of the causation element in a workers' compensation scheme. The goal of the inquiry in workers' compensation is aimed at determining the extent of the claimant's disability due to a work-related injury. A finding that the injury is indeed work-related is thus "necessary" in the sense that, in order to prevail, prior to establishing any other elements of entitlement, a claimant must establish that his impairment is work-related. Such a finding is "necessary" in the sense that it is not merely an alternate basis for entitlement, which would allow claimant to prevail, but is a prerequisite to entitlement on the element which he failed to prove. In this sense, therefore, the causation finding is not merely *dictum* which is not entitled to be given collateral estoppel effect.[2] *Cf.* Restatement (Second) of Judgments §27 (1982).

[2]Thus, this case is distinguishable from *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179, 23 BRBS 21(CRT) (1st Cir. 1989), relied on by the administrative law judge to find collateral estoppel inapplicable. Therein, the court held that the employer was not "adversely affected or aggrieved" for purposes of being able to appeal a Board decision where the Board found that claimant's injury was work-related but that she was not entitled to medical benefits due to the failure to comply with the Act's reporting requirements. *See* 33 U.S.C. §907(d). The court stated that the Board's finding on causation was not essential to the judgment, and therefore not entitled to collateral estoppel effect, because it was *dicta* as the judgment rested on the failure to comply with the reporting requirement. In the case at bar, the causation finding is a prerequisite to any entitlement to disability compensation, whereas in the *Coulombe* case, the denial of medical benefits could have rested solely on the claimant's failure to file the required reports.

Moreover, in this case, the reasons traditionally advanced for denying preclusion are not present. *See* Wright, Miller & Cooper §4421, *supra*, at 199-205. One concern is to prevent the incidental or collateral determination of a non-essential issue from precluding reconsideration of that issue in later litigation. *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983), *citing* 1B J. Moore, J. Lucas & T. Currier, MOORE'S FEDERAL PRACTICE §0.443[5.-1] (2d ed. 1983); Restatement (Second) of Judgments §27 comment h (1982). The concern that insufficient care may have been taken in resolving "unnecessary issues" is not present here, because both parties presented evidence on and fully litigated the causation issue before the state tribunal as a necessary element of entitlement. Indeed, as the administrative law judge stated in his August 1999 Decision at 7-8, claimant and employer relied on the same medical opinion evidence in both forums. As the issue of whether an injury is causally related to claimant's employment is an essential finding necessary to the consideration of all other issues related to entitlement, and as the traditional concerns for denying preclusive effect are not present in this case, we reverse the administrative law judge's conclusion that the state determination that claimant's left knee condition is related to the right knee problems should not be given preclusive effect.[3]

In finding claimant's left knee condition related to the right knee injury, the state deputy commissioner found that claimant's left knee condition is a compensable consequence of the 1991 right knee injury. State Opinion at 6. In the August 31, 1999, Decision and Order Granting Benefits giving preclusive effect to the state determination, the administrative law judge awarded claimant temporary total disability benefits from October 16, 1998 to December 10, 1988, based on claimant's 1991 pre-injury average weekly wage. As we hold that the Virginia Workers' Compensation Commission finding that claimant's left knee condition is causally related to his 1991 right knee injury is to be given preclusive effect, the administrative law judge's August 31, 1999, Decision and Order Granting Benefits, is reinstated.

Accordingly, the Order Granting Motion for Reconsideration and Vacating Decision and Order Granting Benefits, and the Decision and Order on Reconsideration Denying Benefits of the administrative law judge are reversed, and the Decision and Order Granting Benefits is reinstated. In addition, the Decision and Order Granting Benefits is affirmed in all other respects.

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[3]We note employer's contention that collateral estoppel effect should not be accorded to the state's causation finding since it is not a "final" determination given claimant's appeal of the state decision. Inasmuch as claimant was successful in establishing causation at the state level, this finding is not likely the basis for claimant's appeal. Moreover, inasmuch as claimant appealed the denial of benefits, employer could have filed a cross-appeal of the causation finding. This alleviates the concern that collateral estoppel effect not be given to findings that are not subject to appeal. *See* Wright, Miller & Cooper §4421, *supra* at 200-201; Restatement (Second) of Judgments, §27.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge