WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DARYL HART, *Applicant*

vs.

OAKLAND INVADERS; NORTH RIVER INSURANCE COMPANY, administered by CRUM & FORSTER, *Defendants*

Adjudication Number: ADJ13982977
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact (Findings) issued on August 3, 2021 by a workers' compensation administrative law judge (WCJ). The WCJ found that applicant had a prior workers' compensation claim against the Oakland Invaders for injuries sustained while employed between January 15, 1984 and July 24, 1986 (ADJ2497765); that North River Insurance Co was the workers' compensation carrier for the Oakland Invaders in the prior claim as well as in the current claim; no evidence was produced to show how the prior claim was resolved, although payment of $42,000 was made by North River Insurance Co to applicant; that no evidence was produced to establish what injuries or conditions applicant alleged and settled in the prior claim; that defendant did not carry its burden of proof to establish applicant's current claim is the same as his prior claim; and, that applicant's current claim is not barred by res judicata or collateral estoppel.

Defendant contends that an adverse inference should be applied in its favor that the prior claim is the same as the current claim because applicant did not testify at trial regarding the prior claim (Cal. Code Regs., tit. 8, § 10670(c); *Postural Therapeutics v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 551 [51 Cal.Comp.Cases 162]);[1] that based on the adverse inference,

[1] We note that *Postural Therapeutics* was disapproved by *Camper v. Workers' Comp. Appeals Bd*. (1992) 3 Cal.4th 679, 690 [57 Cal.Comp.Cases 644]) to the extent it is inconsistent with the holding in *Camper* that "section 1013 does not operate to extend the 45-day time period prescribed by Labor Code section 5950 in which to file a petition for review." (*Camper, supra,* 3 Cal.4th at p. 690.) Defendant cites *Postural Therapeutics* for purposes unrelated to the holding in *Camper*, and we therefore consider the citation as proper. We caution defendant that it was obligated to

applicant's prior claim should be barred by the doctrine of claim preclusion (res judicata) (*General Dynamics Corp. v. Workers' Comp. Appeals Bd. (Anderson)* (1999) 71 Cal.App.4th 624, 629 [1999 Cal. App. LEXIS 345]);[2] and, that applicant failed to meet his burden of proof that the current claim is for a new injury and not a flare-up of the condition settled in the prior claim (*City of Anaheim v. Workers' Comp. Appeals Bd. (Davis)* (1982) 128 Cal.App.3d 200 [47 Cal.Comp.Cases 52]).

Applicant did not file an answer to the Petition for Reconsideration. The WCJ filed a Report and Recommendation (Report), recommending that the Petition for Reconsideration be denied.

We have reviewed the record in this matter, and have considered the allegations of the Petition for Reconsideration and the contents of the Report. For the reasons set forth in the Report and for those reasons set forth below, we deny the Petition for Reconsideration.

I.

WCAB Rule 10670, subdivision (c) states, "Where a willful suppression of evidence is shown to exist, it shall be presumed that the evidence would be adverse, if produced." (Cal. Code Regs., tit. 8, § 10670(c).) This rule creates a rebuttal presumption, not a conclusive presumption. (*Postural Therapeutics, supra,* 179 Cal.App.3d at p. 556.) We concur with the WCJ that there is no such presumption present in this matter:

> However, contrary to Petitioner's assertion [Petition, P5, L3-4] there is no requirement for Applicant personally to be present at trial to testify, so long as he is represented at trial by counsel. [See: Labor Code section 5700; Reg 10756]. Applicant was represented at trial by his attorney. He was not required personally (or in this instance telephonically) to be present.
>
> In order to guarantee a represented applicant's presence at trial, even if listed as a witness on the pre-trial conference statement, a defendant must either subpoena the applicant or send written notice to appear to the applicant's attorney at least ten days before trial. [C.C.P. 1987(a), (b); See: *Martinez v Friendly Franchisees,*

bring the disapproval under *Camper* to our attention, and its failure to do so could be grounds for sanctions. (See Lab. Code, § 5813 and Cal. Code Regs., tit. 8, § 10421.)

[2] "We have sometimes described 'res judicata' as synonymous with claim preclusion, while reserving the term 'collateral estoppel' for issue preclusion. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896 [123 Cal. Rptr. 2d 432, 51 P.3d 297] (*Mycogen*).) On occasion, however, we have used the term 'res judicata' more broadly, even in a case involving only issue preclusion, or collateral estoppel. (See *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813 [122 P.2d 892].) We are not the only court to sometimes use the term 'res judicata' with imprecision. (See, e.g., *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, fn. 1 [79 L. Ed. 2d 56, 104 S. Ct. 892].) To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel..." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652] (*Faerber*).)

> *et al*, 2015 Cal. Wrk. Comp. P.D. LEXIS 358; *Mubina Kusljugic v Community Assistance for Retarded and Handicapped, Inc*., 2015 Cal. Wrk. Comp. P.D. LEXIS 135; *Luis Gonzalez v. Ontic Engineering Manufacturing*, 2013 Cal. Wrk. Comp. P.D. LEXIS 548]. Petitioner did not subpoena the Applicant, nor did Petitioner send his attorney a written notice for Applicant to appear. Consequently, there was no legal requirement in place for Applicant personally to be present. Thus, his non-attendance raises no adverse inference.
>
> Petitioner knew at the time of the MSC that there was little or no documentary evidence to address the details of the prior claim. In light of that, if Petitioner believed it was necessary for Applicant to testify about the subject at hand, Petitioner should have made arrangements to compel Applicant's personal attendance at trial. This was not done. Accordingly, inasmuch as Applicant's personal presence wasn't legally "necessary" his absence does not provide a basis for an adverse inference. Moreover, there was no obstruction on the part Applicant to Petitioner's inquiry into the prior claim, merely a failure by Petitioner to make sure Applicant was available to testify about it. (Report, pp. 2-3.)

In other words, claim preclusion (res judicata) and issue preclusion (collateral estoppel) are affirmative defenses to applicant's current claim, and it was therefore defendant's burden to establish their elements – *not* applicant's. (Lab. Code, § 5705 ["The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."]; J*ohnson v. Workers' Comp. Appeals Bd.* (1970) 2 Cal.3d 964 [35 Cal.Comp.Cases 362]; see *Morales v. Universal Furniture, American Home Assur. Co.*, 2017 Cal. Wrk. Comp. P.D. LEXIS 591.) Thus, it was up to defendant to produce substantial evidence that applicant's claim is barred by claim or issue preclusion, and applicant was under no legal obligation to *voluntarily* assist defendant in its effort to do so.

II.

The primary issue litigated in this consolidated case is whether applicant's claim is barred by the doctrine of claim preclusion or issue preclusion given the evidence in the record that he had a prior claim for cumulative trauma against this employer during some of the same years. (Def. Exhs. A-C.)

> Claim preclusion "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen, supra*, 28 Cal.4th at p. 896.) Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. (*Ibid*.; *In re Crow* (1971) 4 Cal.3d 613, 622 [94 Cal.

> Rptr. 254, 483 P.2d 1206]; *Teitelbaum Furs, supra*, 58 Cal.2d at p. 604.) If claim preclusion is established, it operates to bar relitigation of the claim altogether.
>
> ...
> In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223]; *Vandenberg*, at p. 828; *Teitelbaum Furs, supra*, 58 Cal.2d at p. 604.)" (*Faerber, supra*, 61 Cal.4th at pp. 824-825.)

It is undisputed that the record contains substantial evidence that the prior case was brought against the same party (Def. Exh. C, p. 2), and that there was a "final judgment" in that prior claim, i.e., a compromise and release was approved on June 21, 1991 (Def. Exh. C, p. 3). The contested issue of fact is whether the prior claim involves the same "cause of action" as the current claim.

> However, for Petitioner to succeed in this endeavor, there must be a comparison of Mr. Hart's prior and current claims in order to ascertain whether the claims are essentially and substantially the same. Moreover, the Court must be able to determine whether the prior settlement agreement addressed to a meaningful degree the particular claims raised in the current claim. For instance, if the prior claim alleged injury to Mr. Hart's low back as a consequence of repetitive trauma incurred while playing football for the Oakland Invaders, and that claim was settled explicitly by a compromise and release agreement, a current claim alleging injury to Mr. Hart's low back as a consequence of repetitive trauma incurred while playing football for the Oakland Invaders would be barred—it's the same claim brought a second time.
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> Here, the Court found that Daryl Hart did file a prior workers' compensation claim against the Oakland Invaders for injuries sustained while employed between 1/15/84 and 7/24/86. His current claim is for injuries while employed with the Oakland Invaders as a football player between January 4, 1984 and June 15, 1991.
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> However, the trial Court also found that the parties produced no evidence to show what injuries or conditions Mr. Hart alleged in the prior claim or what injuries or conditions Mr. Hart settled in the prior claim. Nonetheless, Petitioner asserts that the evidence presented at trial "should be sufficient" to show that applicant's current claim for injury is duplicative of the prior claim. It's difficult to understand what evidence Petitioner can point to in order to establish that the current claim is a duplicate of the prior claim. (Report, pp. 4-5.)

We concur with the WCJ that defendant failed to meet its burden of proof, and hence, the burden never shifted back to applicant to establish that the current claim involves a new injury. (See Petition for Reconsideration, p. 7.) There is no evidence in the record – substantial or otherwise – to determine whether the current claim is the same claim previously settled. The doctrines of claim preclusion and issue preclusion do not apply when the prior claim involves a different injury. (*Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1811-1812 (59 Cal.Comp.Cases 324].)

Contrary to defendant's contentions, the bare fact that applicant had a prior claim for a cumulative trauma injury against this defendant with some crossover years, does not in itself establish an identity of claim. (See Petition for Reconsideration, p. 7.) Defendant appears to be arguing that no employee can ever sustain more than one cumulative trauma injury from the same employer and/or during the same years. (Petition for Reconsideration, p. 8.) This argument is specious. It is established law that employees may file more than one claim for industrial injury, whether an injury is specific or due to cumulative trauma. (Lab. Code, § 3208.2; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323].)[3]

There is also no evidence in this record to support barring any of the body parts plead by applicant in the current claim under the doctrine of issue preclusion, based on his prior claim. (See *Nash, supra,* and *Morales, supra.*) Again, issue preclusion will not apply if the current claim involves a different injury. (*Nash, supra.*)

> Mr. Hart's current claim alleges injury to multiple parts of body, including nervous system in the form of stress, nervous system in the form of psychiatric injury, trunk, lower extremities, body system, head, brain, ears, jaw, mouth, teeth, nose, neck, skull, arms, wrist, hand and fingers, abdomen including internal organs and groin, back, chest, hips including pelvis and pelvic organs, elbow, buttocks, shoulders, leg, ankle, circulatory system including heart, digestive system, respiratory system including lungs, trachea, and reproductive

[3] "In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (citations) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. (citations) For example, if an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury. (citations) In addition, one exposure may result in two distinct injuries, posing another question of fact. (citation) If a worker not only suffers a nervous breakdown but also develops an ulcer as a result of work- related stress, there would be two distinct injuries from one exposure. The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received." (*Western Growers, supra,* 16 Cal.App.4th at pp. 234-235.)

> system [MOH P2, L4-11]. In the face of these allegations of extensive injury nothing was produced at trial to document the allegations in the prior claim and nothing was produced at trial to document what was settled in the prior claim. Consequently, no comparison of the claims can be made. As pointed out in the Opinion, "All the Court has is the fact that a cumulative trauma type claim affecting unknown parts-of body was filed against the Oakland Invaders, covering some of the years currently alleged as injurious, and that likely it was settled, maybe by a compromise & release, and a payment of $42,000 was made to Mr. Hart and his attorney." [Opinion, P6]. (Report, p. 6.)

Defendant argues that "[i]f a rule of law were to be established that duplicative claims can be filed just because settlement documents are no longer available, then many cases would be re-litigated, and the applicant would have a second bite at the apple." (Petition for Reconsideration, p. 8.) We cannot agree with defendant. First, this panel decision is not a "rule of law." While panel decisions may be cited as persuasive, panel decisions are not binding precedent (as are en banc decisions) on all Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) Next, the Findings and this panel decision are based on the facts and circumstances *in this case*, and would not necessarily be persuasive in any other case.

Of more significance, the WCJ's Findings do not actually find or hold that duplicative claims may be filed "just because settlement documents are no longer available..." (Petition for Reconsideration, p. 8.) The Findings state that *on the record of this case*, defendant failed to meet its burden of proof to establish that applicant's current claim is barred by the doctrine of issue preclusion. *In this case*, it is true that all records related to the prior claim were purged by the Workers' Compensation Appeals Board. It is also true that defendant chose to purge all records related to applicant's prior claim when it transitioned to electronic record keeping. Defendant chose not to retain a copy of the Compromise and Release in the prior claim.

> But, this lack of records is not just because of the passage of time, it is because Petitioner made a decision not to keep those old records. Petitioner's witness stated the carrier kept "… *only payment information, and this was entered when the data was transferred from paper to computer system*. [SOE P5, L11-19, P6, L4-6]. (Report, p. 6, emphasis in the original.)

In addition, and as stated by the WCJ in the Report, defendant "knew at the time of the MSC that there was little or no documentary evidence to address the details of the prior claim..." Even so, defendant did not take the affirmative steps necessary to meet its burden of proof.

Defendant failed to secure applicant's testimony at trial, even though there are clear methods to do so, including serving a notice to appear on applicant's attorney. Defendant knew the identity of the prior applicant's attorney, and the identity of his prior orthopedist. (Def. Exh. B; Petition for Reconsideration, p. 2; Defendant's Trial Brief, p. 2.) However, defendant did not produce any documentary or testimonial evidence from either the attorney or the orthopedist. Of course, they may not have retained records, may not have had memory of the prior claim, and/or may not have been available to testify. However, the record is silent on this potential evidence.

In essence, defendant urges this panel to protect the interests of the employer at the expense of the injured worker, regardless of the circumstances presented in this case. We remind defendant that all injured workers have a constitutional right to substantial justice. (Cal Const, Art. XIV § 4 [Mandating "substantial justice" in all workers' compensation cases.]; *Webb v. Workers' Comp. Appeals Bd.* (1980) 28 Cal. 3d 621, 626–627 [45 Cal. Comp. Cases 1282] citing *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 233 ["'[T]he underlying policy of [the workers' compensation statutes and their constitutional foundation...] as well as the recurrent theme of countless appellate decisions on the matter has been one of a pervasive and abiding solicitude for the workman.'"].)

Accordingly, we affirm the Findings and deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued on August 3, 2021 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 15, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DARYL HART
GLENN, STUCKY & PARTNERS LLP
SIEGEL, MORENO & STETTLER, APC

AJF/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

BACKGROUND

Applicant, Daryl Hart, is a former professional athlete who filed in December 2020 an Application for Adjudication of claim alleging cumulative injury against the Oakland Invader football team. The Defendant opposed the claim, contending that it was barred by the doctrine of res judicata because Mr. Hart had pursued and settled a previously filed claim of continuous trauma injury against the team. The dispute was tried without testimony after which the Court found that:

> *1. Daryl Hart filed a prior workers' compensation claim against the Oakland Invaders for injuries sustained while employed between 1/15/84 and 7/24/86 [ADJ2497765].*
>
> *2. North River Insurance Co was the workers' compensation carrier for the Oakland Invaders in the prior claim as well as in the current claim.*
>
> *3. The parties have produced insufficient evidence to show how the prior claim was resolved, although payment of $42,000 was made by North River Insurance Co to Mr. Hart and his attorney in the prior claim.*
>
> *4. The parties have produced no evidence to show what injuries or conditions Mr. Hart alleged in the prior claim.*
>
> *5. The parties have produced no evidence to show what injuries or conditions, if any, Mr. Hart settled in the prior claim.*
>
> *6. Defendant has not carried its burden of proving that Applicant's current claim is the same as his prior claim, nor that it is precluded by settlement of his prior claim.*
>
> *7. Mr. Hart's current claim is not barred by res judicata nor is any part barred by collateral estoppel.*

Being aggrieved by the Court's findings, the Defendant (hereafter "Petitioner") filed a timely, verified Petition for Reconsideration. The issues raised in that petition are addressed below.

DISCUSSION

A.

Petitioner contends that where an applicant fails to appear and testify to his knowledge of the prior claim, an adverse inference should be made.

Mr. Hart was not personally present at trial, although he was represented by counsel. Petitioner asserts that Applicant's absence should nonetheless be a basis for the Court to make an adverse inference or to establish an evidentiary presumption unfavorable to Applicant.

The point of an adverse inference is to reinforce requirements that necessary evidentiary items not be purposely withheld [*Postural Therapeutics v. Workers' Comp. Appeals Bd*., 179 Cal. App. 3d 551 (1986)]. However, contrary to Petitioner's assertion [Petition, P5, L3-4] there is no requirement for Applicant personally to be present at trial to testify, so long as he is represented at trial by counsel. [See: Labor Code section 5700; Reg 10756]. Applicant was represented at trial by his attorney. He was not required personally (or in this instance telephonically) to be present.

In order to guarantee a represented applicant's presence at trial, even if listed as a witness on the pre-trial conference statement, a defendant must either subpoena the applicant or send written notice to appear to the applicant's attorney at least ten days before trial. [C.C.P. 1987(a), (b); See: *Martinez v Friendly Franchisees, et al*, 2015 Cal. Wrk. Comp. P.D. LEXIS 358; *Mubina Kusljugic v Community Assistance for Retarded and Handicapped, Inc.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 135; *Luis Gonzalez v. Ontic Engineering Manufacturing*, 2013 Cal. Wrk. Comp. P.D. LEXIS 548]. Petitioner did not subpoena the Applicant, nor did Petitioner send his attorney a written notice for Applicant to appear[1]. Consequently, there was no legal requirement in place for Applicant personally to be present. Thus, his non-attendance raises no adverse inference.

Petitioner knew at the time of the MSC that there was little or no documentary evidence to address the details of the prior claim. In light of that, if Petitioner believed it was necessary for Applicant to testify about the subject at hand, Petitioner should have made arrangements to compel Applicant's personal attendance at trial. This was not done. Accordingly, inasmuch as Applicant's personal presence wasn't legally "necessary" his absence does not provide a basis for an adverse inference. Moreover, there was no obstruction on the part Applicant to Petitioner's inquiry into the prior claim, merely a failure by Petitioner to make sure Applicant was available to testify about it.

B.

Petitioner contends the facts and evidence presented at trial should be sufficient to establish that Applicant's current claim for injury is duplicative of his prior claim of injury against the same employer, for the same date of injury.

With respect to defendant's assertion that Mr. Hart's current claim is foreclosed by the doctrines of res judicata[2] and collateral estoppel, there first needs to be a common understanding of what these terms mean. Courts refer to "claim preclusion" rather than "res judicata" and use "issue preclusion" in place of "direct or collateral estoppel." Claim and issue preclusion have different requirements and effects. Claim preclusion prevents re- litigation of entire causes of action. Claim preclusion applies only when a second suit involves the same cause of action between the same parties or their privies after a final judgment on the merits in the first suit. Issue preclusion, by contrast, prevents re-litigation of previously decided issues, rather than causes of action as a whole. [See: *Samara v. Matar*, 5 Cal. 5th 322 (2018)]. Claim preclusion, the primary aspect of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same

[1] In its opinion, at page 5, this Court noted that "Applicant was not present to testify. Defendant did not either subpoena the applicant or send to the applicant's attorney a pre-trial written notice for Applicant to appear."

[2] Res judicata means "thing adjudged;" the doctrine holds that, once a cause of action has been presented for adjudication and a final judgment on the merits has been rendered, then the same cause of action cannot be asserted in a subsequent suit.

parties [*DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813]. This, of course, is the hook upon which Petitioner wishes to hang its hat.

However, for Petitioner to succeed in this endeavor, there must be a comparison of Mr. Hart's prior and current claims in order to ascertain whether the claims are essentially and substantially the same. Moreover, the Court must be able to determine whether the prior settlement agreement addressed to a meaningful degree the particular claims raised in the current claim. For instance, if the prior claim alleged injury to Mr. Hart's low back as a consequence of repetitive trauma incurred while playing football for the Oakland Invaders, and that claim was settled explicitly by a compromise and release agreement, a current claim alleging injury to Mr. Hart's low back as a consequence of repetitive trauma incurred while playing football for the Oakland Invaders would be barred—it's the same claim brought a second time.

Here, the Court found that Daryl Hart did file a prior workers' compensation claim against the Oakland Invaders for injuries sustained while employed between 1/15/84 and 7/24/86. His current claim is for injuries while employed with the Oakland Invaders as a football player between January 4, 1984 and June 15, 1991.

However, the trial Court also found that the parties produced no evidence to show what injuries or conditions Mr. Hart alleged in the prior claim or what injuries or conditions Mr. Hart settled in the prior claim. Nonetheless, Petitioner asserts that the evidence presented at trial "should be sufficient" to show that applicant's current claim for injury is duplicative of the prior claim. It's difficult to understand what evidence Petitioner can point to in order to establish that the current claim is a duplicate of the prior claim.

Petitioner has provided no proof that the current claim is the same as the prior claim. In *Johns Mansville v. WCAB* (Cooper), 81 CCC 216 (2016), the subsequent (death) claim was not precluded because the prior settlement addressed and referred to injury to the lungs and respiratory system whereas the death was from peritoneal mesothelioma, a cancer in the lining of his abdominal cavity. Although the injury mechanism was similar—exposure to asbestos—the resulting injuries were different. Here, there is no evidence offered to ascertain whether the medical conditions alleged now as work-related are different or the same as those settled in the earlier claim.

In *Travelers Insurance Co. v WCAB* (Duckworth), 81 CCC 234 (2016), the Defendant asserted that the applicant's current claim involving a brain injury was barred by a compromise and release agreement settling applicant's prior claim for cumulative orthopedic injury during same period but was unsuccessful because a review of the record from the prior case disclosed when Applicant's case was settled there was no allegation of brain injury. The court stated that a general release in a workers' compensation case will bar other potential claims against the employer, but those claims must exist and be known at the time of execution of the release[3]. Here we have no way of knowing with any clarity what Mr. Hart initially alleged, what conditions medical documentation showed as existing or known, nor what in fact was settled in 1991.

[3] See also: Bell v Los Angeles Raiders, 2015 Cal. Wrk. Comp. P.D. LEXIS 338

In *City of Anaheim v WCAB* (Davis), 47 CCC 52 (1982), City of Anaheim contended that an injury claim asserted against it was the same industrial injury as that asserted by the applicant in an earlier case which was settled and that liability for that injury was finally determined and adjudicated by the Board approved compromise and release. The appellate court compared the two claims, looking to the terms of the prior compromise and release and reviewing the medical evidence, after which it determined that indeed, the City was correct: there was no new or different claim, but one claim for an ongoing condition and that claim was settled. Here there is no evidence upon which to make such a comparison to ascertain whether the current claim is essentially the same claim as the one brought (and apparently settled) previously by Mr. Hart.

Mr. Hart's current claim alleges injury to multiple parts of body, including nervous system in the form of stress, nervous system in the form of psychiatric injury, trunk, lower extremities, body system, head, brain, ears, jaw, mouth, teeth, nose, neck, skull, arms, wrist, hand and fingers, abdomen including internal organs and groin, back, chest, hips including pelvis and pelvic organs, elbow, buttocks, shoulders, leg, ankle, circulatory system including heart, digestive system, respiratory system including lungs, trachea, and reproductive system [MOH P2, L4-11]. In the face of these allegations of extensive injury nothing was produced at trial to document the allegations in the prior claim and nothing was produced at trial to document what was settled in the prior claim. Consequently, no comparison of the claims can be made[4]. As pointed out in the Opinion, "*All the Court has is the fact that a cumulative trauma type claim affecting unknown parts-of body was filed against the Oakland Invaders, covering some of the years currently alleged as injurious, and that likely it was settled, maybe by a compromise & release, and a payment of $42,000 was made to Mr. Hart and his attorney*." [Opinion, P6].

C.

Petitioner asserts that it is unfair to allow Applicant to proceed with his current claim because no one would expect a Defendant to retain records of a case for over 30 years.

This brings up the essence of Petitioner's problem, namely that the carrier has no access to old records. But, this lack of records is not just because of the passage of time, it is because Petitioner made a decision not to keep those old records. Petitioner's witness stated the carrier kept "… *only payment information, and this was entered when the data was transferred from paper to computer system*. [SOE P5, L11-19, P6, L4-6].

Whatever documentation may have existed with respect to the original claim was apparently destroyed by the carrier at the time of its conversion to a computerized system. Thus, the lack of available documentation is due to a decision on the part of Petitioner who, in its changeover to a computerized system, elected not to retain anything other than payment information. Any prejudice based on lack of documentation is the result Petitioner's own actions[5].

[4] See Morales v Universal Furniture, 2017 Cal. Wrk. Comp. P.D. LEXIS 591 on the importance of being able to compare old vs new claims.

[5] See *Godbolt v Wherehouse Entertainment*, 2012 Cal. Wrk. Comp. P.D. LEXIS 69

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be DENIED for the reasons stated herein.

DATE: September 1, 2021

Marco Famiglietti
WORKERS' COMPENSATION JUDGE