

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

TRACIE KEILLOR, *Applicant*

vs.

COUNTY OF SACRAMENTO, *Permissibly Self-Insured, Defendant*

**Adjudication Numbers: ADJ8835024; ADJ8996815
Sacramento District Office**

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of February 1, 2021, wherein it was found, "The County of Sacramento ... is collaterally estopped from asserting that applicant's stroke on February 13, 2013 was not industrially related."¹

Defendant contends the WCJ erred in finding that collateral estoppel from applicant's civil suit against defendant applied in the instant workers' compensation proceedings. As noted below, in the civil suit, applicant successfully asserted that defendant had retaliated against her for filing a complaint that a coworker was gaining preferential treatment as a result of personal relationship. In the civil suit, applicant successfully alleged that stress caused by the retaliation caused her to suffer a stroke. We have received an Answer from the defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny reconsideration for the reasons stated by the WCJ in the Report quoted below. Following the quote, we explain where we depart from the WCJ's reasoning. We incorporate the following from the WCJ's Report:

Tracie Keillor, a Deputy Sheriff, suffered a stroke on February 13, 2013 and claims that it is industrially related. (Ms. Keillor will hereinafter, be referred to as "applicant" to avoid confusion. It is noted that technically, the Application for Adjudication was originally filed by County of Sacramento). Pursuant to the stipulation of the parties, applicant also sustained an industrial injury on

¹ Since our prior decisions in this matter, the late Commissioner Frank Brass is no longer an Appeals Board Commissioner. Commissioner Marguerite Sweeney has been substituted in his place.

September 10, 2008 to her back, neck, right forearm and right shoulder. She claims further injury to her brain and heart during this incident, which defendant denies. (12/2/2015 Minutes of Hearing). The parties proceeded forward on various issues including AOE/COE for the February 13, 2103 injury (specifically raising the heart presumption pursuant to Labor Code 3212.5). WCJ Farmer found applicant's stroke was industrially related via Labor Code 3212.5 on March 22, 2016. Defendant filed a Petition for Reconsideration of the Findings, which ultimately resulted in their rescission. (6/4/16 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration). Applicant filed a Petition for Reconsideration of the WCAB's decision which ultimately led the Court of Appeal annulling the June 4, 2106 Opinion of the WCAB. During the back and forth of these Appeals applicant successfully litigated her civil claim of workplace harassment and retaliation that resulted in the February 13, 2013 stroke. Applicant asserted this was newly discovered evidence and raised the issue of collateral estoppel. In its June 26, 2017, Opinion on Decision After Remittitur, the WCAB remanded the matter back to the trial level to "determine whether the principle of collateral estoppel compels a finding of heart trouble causing the stroke, or a finding that the stroke is otherwise industrial, or if still relevant, whether applicant is entitled to further development of the record to establish that the stroke was industrial independent of the heart trouble presumption."

Judge Farmer retired, thus, the matter was assigned to the undersigned. After discussion with the parties, it was ascertained that the issue would be broken into two separate trials: first to determine the admissibility of the voluminous evidence and second to determine the issue of collateral estoppel. The Court issued its Order Admitting Evidence on October 22, 2019. The trial regarding the issue of collateral estoppel occurred on October 28, 2020. A Findings of Fact issued February 1, 2021 finding that defendant was estopped from asserting that applicant's February 13, 2013 stroke was not industrially related. Defendant filed its Petition for Reconsideration in relation to this finding.

The specific details of applicant's workers compensation case and civil case have been laid out in detail in the February 1, 2021 Findings of Fact and February 24, 2021 Petition for Reconsideration as well as various pleadings throughout the case. They will not be duplicated here.

Collateral estoppel requires a five prong analysis: "First, the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 [94 Cal.Rptr.3d 1, 207 P.3d 506].)

As noted in the Petition for Reconsideration “the ‘identical issue’ requirement addresses whether ‘identical factual allegations’ are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [citations]” Generally, applicant’s civil proceeding alleged that the harm suffered by her employment stress included her stroke; applicant was awarded damages for the stroke (harm).

(Report at pp. 1-3.)

We agree that the identical issue of whether defendant’s conduct caused the stroke was determined by the jury in the civil trial. As admitted by the defendant, “The civil claim did arguably find Applicant’s stroke to be due to the employer’s adverse employment action.” (Petition for Reconsideration at p. 11.) Defendant admits that “Applicant litigated what is essentially a cumulative trauma stress claim resulting in a stroke in the Superior Court.” (Petition for Reconsideration at p. 12.) Defendant thus appears to admit that the jury in the civil case made the finding that the applicant’s stroke is industrially related. Defendant makes a great deal out of the fact that the two cases in the workers’ compensation matter are currently pled as specific injuries. However, in workers’ compensation proceedings, amendment to pleadings is liberally allowed, and “substituting a claim for cumulative rather than specific injury does not constitute a new and different cause of action” (*Bassett-McGregor v. Workers’ Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]) so long as the operative facts are not completely different. As noted by the WCJ in the Report, “identical issue” for purposes of collateral estoppel addresses underlying facts, not legal theories or causes of action. Applicant may seek to amend the pleadings in further proceedings to allege cumulative injury, but this does not affect the WCJ’s actual finding in the February 1, 2021 decision that the civil jury found that the stroke was industrially caused.

However, defendant and the WCJ both erroneously state that the sole issue in the civil and workers’ compensation proceedings was whether stress-induced atrial fibrillation caused the applicant’s stroke. To be fair, with regard to the workers’ compensation proceedings, we made the same mistake in our Opinion and Orders of June 14, 2016 and September 9, 2016. However, in our Opinion and Decision of June 26, 2017, we noted that our previous decisions were in error because they did not “take into account the fact that applicant may have raised the issue of industrial injury outside of the Labor Code section 3212.5 heart trouble presumption and was seeking further development of the record in the form of a neurological evaluation. (See December 2, 2015 Minutes of Hearing and Summary of Evidence at p. 2, Issue No. 1.) Because the WCJ

found industrial injury based on the heart presumption, she did not reach the issue of whether applicant may have established industrial injury outside the heart presumption, or whether she was entitled to further development of the record to establish industrial injury outside of the section 3212.5 presumption.” (June 26, 2017 Opinion and Decision at p. 2.) We expressly returned the issue to the trial level “to determine whether the principle of collateral estoppel compels a finding of heart trouble causing the stroke *or a finding that the stroke was otherwise industrial* or, if still relevant, whether applicant is entitled to further development of the record *to establish that the stroke was industrial independent of the heart trouble presumption.*” (June 26, 2017 Opinion and Decision at p. 3 [emphasis added].) While applicant had not yet submitted evidence on this issue, this is separate from the question of whether it was at issue. Because applicant has established this fact in the civil proceedings, collateral estoppel applies, and she does not need to present evidence on this issue in the workers’ compensation proceedings.

Similarly, the WCJ incorrectly states in her Report that, “Plaintiff did not submit an allegation that applicant’s stroke had nothing to do with her heart” (Report at p. 6) “[t]he only evidence presented that related applicant’s stroke to her employment was [expert witness] Dr. Vankatasubramanian’s opinion that applicant suffered embolic stroke due to atrial fibrillation” (Report at p. 9.) Although it is true that the expert testimony presented by applicant at the civil trial was that atrial fibrillation caused her stroke, applicant testified at the civil trial that stress generally caused her stroke. (Applicant’s Civil trial testimony of April 18, 2016, Ex. 18 at p. 133.) Inexplicably, the parties introduced voluminous portions of the civil trial record, but did not introduce the actual jury instructions. However, in applicant’s civil Opposition to Defendant’s Motion for Judgment Notwithstanding the Verdict (JNOV), admitted into the workers’ compensation proceedings as Exhibit 17, applicant recites that defendant requested a jury instruction which read, “Tracie Keillor claims that actions taken by the County of Sacramento Sheriff’s Department caused her to suffer a stroke in 2013. Tracie Keillor has the burden of proving that the conduct of the County of Sacramento Sheriff’s Department was a substantial factor in causing the stroke. This must be proven within a reasonable medical probability, based on expert testimony.” (Ex. 17, p. 11.) However, plaintiff objected to this proposed jury instruction, and the following jury instruction was actually given to the jury: “A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more

than a remote or trivial factor. It does not have to be the only cause of the harm.” (Ex. 17, pp. 10-11.)

Given that the jury instruction expressly omits the need to follow the expert testimony, we cannot infer that the jury adopted the specific mechanism of injury testified to by the civil expert witness. Therefore, while it is clear that the civil jury determined that applicant’s stroke was caused by stress, collateral estoppel does not extend to the issue of whether the stroke was caused by atrial fibrillation or heart trouble.

With regard to the second and third elements of collateral estoppel, that the issue was “actually litigated” and “necessarily decided”, the jury expressly found in the Special Verdict that defendant’s conduct was a substantial factor in causing “harm” to the applicant, and the “harm” found by the jury necessarily included the stroke, given that the jury awarded applicant \$500,000.00 for “physical pain and suffering.” The only physical injury alleged in the civil trial was the stroke.

Defendant does not contest the fourth element of collateral estoppel. The jury verdict was clearly a judgment on the merits, and defendant having abandoned its civil appeal, the judgment is final. Additionally, the County of Sacramento is the identical defendant in both actions.

Finally, we reject defendant’s argument that collateral estoppel should be rejected because applying it would “violate the policy behind res judicata.” (Petition for Reconsideration at p. 17.) Application of collateral estoppel would prevent us from reaching a finding inconsistent with the jury’s verdict. The jury verdict was reached after numerous days of trial testimony, and civil proceedings have higher procedural protections in place for the litigants than do workers’ compensation proceedings, where we forego procedural formalities in favor of expeditious and inexpensive proceedings. The causation standard in the jury instructions, “substantial harm,” is not a lesser standard than the “contributing cause” standard relevant to workers’ compensation proceedings (*South Coast Framing, Inc. v. Workers’ Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases 489].) Accordingly, we will deny the defendant’s Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact of February 1, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2021

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

**TRACIE KEILLOR
LaROCHE & MALLORY
TWOHY, DARNIELLE & FRYE**

DW/oo

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