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This opinion is uncorrected and subject to revision before
publication in the New York Reports.

No. 212
Maria Augui, &c., et al.,
Respondents,
v.
Seven Thirty One Limited
Partnership, et al.,
Appellants.

The Insider's Summary:

"We find that there is no identity of issue and that collateral estoppel therefore should not be applied. [Therefore,] Upon reargument, this Court's decision of February 14, 2013 vacated, the remittitur recalled, the order appealed from affirmed, with costs, and the certified question answered in the affirmative."

Richard J. Montes, for appellants.
Annette G. Hasapidis, for respondents.
New York State Trial Lawyers Association; New York State AFL-CIO et al.; New York State Bar Association; Workers Injury Law & Advocacy Group; Defense Association of New York, Inc.; Federation of Defense and Corporate Counsel; County of Suffolk; Real Estate Board of New York et al.; The Center for Popular Democracy; Make the Road New York et al.; The Black Institute; and New York Communities for Change, amici curiae.

LIPPMAN, Chief Judge:

The issue presented by this appeal is whether the determination of the Workers' Compensation Board, finding that plaintiff had no further causally-related disability and no further need for treatment, was entitled to collateral estoppel effect in plaintiff's personal injury action. We find that there

is no identity of issue and that collateral estoppel therefore should not be applied.

On December 24, 2003, Jose Verdugo (hereinafter plaintiff)* was injured during the course of his employment as a food delivery person, when he was struck in the head by a sheet of plywood that fell to the sidewalk from a building under construction on Lexington Avenue, near 59th Street in Manhattan. Defendant Seven Thirty One Limited Partnership was the owner of the premises. Defendant Bovis Lend Lease LMB was the construction manager for the project and defendant North Side Structures, Inc. was the concrete superstructure subcontractor. Following the accident, plaintiff began receiving workers' compensation benefits for injuries to his head, neck and back, as well as for post-traumatic stress disorder and depression. He commenced this personal injury action in 2004.

In December 2005, the insurance carrier for plaintiff's employer moved to discontinue plaintiff's workers' compensation benefits and the parties proceeded to a hearing before an administrative law judge (ALJ). Each side was permitted to introduce expert medical testimony, which was subject to cross-examination. The ALJ ultimately found that plaintiff had "no further causally-related disability since January 24, 2006."

Plaintiff sought administrative review and, as relevant

* The named plaintiffs are Maria Auqui, as guardian of the property of Jose Verdugo, and Maria Verdugo, Jose Verdugo's wife.

here, the Workers' Compensation Board Panel affirmed, finding record support for the ALJ's credibility determinations. The Panel agreed that plaintiff had no further causally-related disability and found that he had "no further need for treatment."

Subsequently, in this negligence action, defendants moved for an order estopping plaintiff from "relitigating" the issue of causally-related disability beyond January 24, 2006, arguing that the matter had been finally determined by the Workers' Compensation Board. Supreme Court granted the motion, finding that plaintiff had a full and fair opportunity to address the issue before the Board and precluded him from further litigating that issue.

The Appellate Division reversed, finding that the determination of the Workers' Compensation Board was one of ultimate fact and thus did not preclude plaintiff from litigating the issue of his ongoing disability (83 AD3d 407 [1st Dept 2011]). Two Justices dissented and would have affirmed. The dissent agreed with Supreme Court that the issue of the duration of plaintiff's disability was the same in both proceedings and that plaintiff had a full and fair opportunity to litigate the issue before the Board. The Appellate Division granted defendants' motion for leave to appeal to this Court, certifying the following question for our review: "[w]as the order of this Court, which reversed the order of the Supreme Court, properly made?" We affirm and answer the certified question in the

affirmative.

The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal (Jeffreys v Griffin, 1 NY3d 34, 39 [2003]). Whether collateral estoppel should be applied in a particular case turns on "general notions of fairness involving a practical inquiry into the realities of the litigation" (Jeffreys, 1 NY3d at 41, quoting Matter of Halyalkar v Board of Regents of State of N.Y., 72 NY2d 261, 268 [1988]). We have also recognized that collateral estoppel, a flexible doctrine, "is applied more flexibly" in the context of the determinations of administrative agencies (Jeffreys, 1 NY3d at 40, quoting Allied Chem. v Niagara Mohawk Power Corp., 72 NY2d 271, 276 [1988]). To that end, "among the factors bearing on whether an administrative decision is 'quasi-judicial' are 'whether the procedures used in the administrative proceeding . . . were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired'" (Jeffreys, 1 NY3d at 40-41, quoting Allied Chem., 72 NY2d at 276-277). It is the party seeking to invoke collateral estoppel who bears the burden of establishing identity of issue (see Jeffreys, 1 NY3d at 39).

Here, defendants have failed to meet their burden of establishing that the issue decided in the workers' compensation proceeding was identical to that presented in this negligence action. We have observed that the Workers' Compensation Law "is the State's most general and comprehensive social program, enacted to provide all injured employees with some scheduled compensation and medical expenses, regardless of fault for ordinary and unqualified employment duties" (Matter of Balcerak v County of Nassau, 94 NY2d 253, 259 [1999]). The purpose of awarding such benefits is to provide funds on an expedited basis that will function as a substitute for an injured employee's wages (see Surace v Danna, 248 NY 18, 20-21 [1928, Cardozo, Ch. J.] [the Workers' Compensation Law was enacted to save the injured worker "from becoming one of the derelicts of society, a fragment of human wreckage"]). We have observed that the term "disability," as used in the Workers' Compensation Law, "generally refers to inability to work" (Rubeis v Aqua Club, Inc., 3 NY3d 408, 417 [2004]). In addition, the Board uses the term "disability" in order to make classifications according to degree (total or partial) and duration (temporary or permanent) of an employee's injury (see Martin Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 15 at 44). The focus of the act, plainly, is on a claimant's ability to perform the duties of his or her employment.

By contrast, a negligence action is much broader in scope. It is intended to make an injured party whole for the enduring consequences of his or her injury -- including, as relevant here, lost income and future medical expenses. Necessarily, then, the negligence action is focused on the larger question of the impact of the injury over the course of plaintiff's lifetime. Although there is some degree of overlap between the issues being determined in the two proceedings, based on the scope and focus of each type of action, it cannot be said that the issues are identical.

In a similar vein, we previously found that there was no identity of issue between a Workers' Compensation Board determination that an injury was work-related and an application for enhanced benefits under General Municipal Law § 207-c (see Balcerak, 94 NY2d at 258). While recognizing that both types of proceedings required a determination that the injury had been sustained in the course of the claimant's employment, we observed that the purposes behind the two legislative schemes were very different. Workers' compensation benefits are intended to be dispensed regardless of fault, for any injury arising out of and in the course of one's employment (see Balcerak, 94 NY2d at 259). Section 207-c benefits, on the other hand, are more expansive, but apply to a narrower class of work-related injury, relative to the performance of law enforcement duties (see Balcerak, 94 NY2d at 260). We further noted that separate bodies were charged with

making each type of determination and that "[t]he burdens, procedures and prescribed benefits [were] also significantly distinct" (Balcerak, 94 NY2d at 261). Related concerns are reflected here, where the jury is charged with determining the broader question of plaintiff's total loss, as opposed to the Workers' Compensation Board's narrower focus on the employee's ability to work.

In addition, in Matter of Bissell v Town of Amherst (18 NY3d 697 [2012]), we recognized certain distinctions between the workers' compensation process and negligence actions, in the context of the carrier's obligation to pay its share of litigation costs.

"In a third-party action, the injured employee will have only one opportunity to obtain a recovery for future medical expenses, and the jury assessing the medical evidence will have the chance to make but one award for such expenses, if any. By contrast, in the workers' compensation context it is possible to wait and see what happens, and to require the carrier to pay its share of litigation costs when that share can be accurately calculated -- i.e., when the actual medical expenses that the carrier has been relieved from paying are known. Moreover, whether the claimant is entitled to medical treatment pursuant to the Workers' Compensation Law is a determination that must be made by the Workers' Compensation Board, and such determination is not dependent upon the jury's verdict in the third-party action"

(Bissell, 18 NY3d at 702). Given the realities of these distinct proceedings, the finder of fact in a third-party negligence action, in its attempt to ascertain the extent of plaintiff's

total damages, should not be bound by the narrow findings of the Board regarding the duration of plaintiff's injury or his need for further medical care.

Moreover, based on the expedited nature of workers' compensation proceedings, parties may not have the means to litigate the matter beyond the issue presented to the Board (see e.g. *Gilberg v Barbieri*, 53 NY2d 285, 293 [1981]). Notably, here, plaintiff did not obtain neuropsychiatric testing for the workers' compensation hearing, which his physicians had deemed necessary to diagnose his particular type of injury and which he will seek to submit to a jury in the personal injury action.

We stress that this holding should not be read to impair the general rule that the determinations of administrative agencies are entitled to collateral estoppel effect (see e.g. *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226 [2011]). That rule is well-settled and should continue to be applied where, unlike here, there is identity of issue between the prior administrative proceeding and the subsequent litigation.

Accordingly, upon reargument, this Court's decision of February 14, 2013 should be vacated, the remittitur recalled, the order appealed from affirmed, with costs, and the certified question answered in the affirmative.

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Upon reargument, this Court's decision of February 14, 2013 vacated, the remittitur recalled, the order appealed from affirmed, with costs, and the certified question answered in the affirmative. Opinion by Chief Judge Lippman. Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided December 10, 2013

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