Auqui v Seven Thirty One Ltd. Partnership

2013 NY Slip Op 00950 [20 NY3d 1035]

February 14, 2013

Court of Appeals

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Maroon page border is Appellate Division

Maria Auqui, as Guardian of the Property of Jose Verdugo, et al., Respondents,
v
Seven Thirty One Limited Partnership et al., Appellants.

Argued January 8, 2013; decided February 14, 2013
Auqui v Seven Thirty One Ltd. Partnership, 83 AD3d 407 , reversed.

APPEARANCES OF COUNSEL
Mauro Lilling Naparty LLP, Woodbury (*Richard J. Montes* and *Matthew W. Naparty* of counsel), for appellants.
Law Offices of Annette G. Hasapidis, South Salem (*Annette G. Hasapidis* of counsel), and *Schwartz, Goldstone & Campisi, LLP*, New York City (*Herbert Rodriguez, Jr.*, of counsel), for respondents.
Michael Jaffee, New York City, and *Brian J. Isaac* for New York State Trial Lawyers Association, amicus curiae.

{**20 NY3d at 1036} OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be reversed, with costs, defendants' motion to preclude plaintiffs[FN*]from litigating the issue of plaintiff Jose Verdugo's accident-related [*2]disability beyond January 24, 2006 granted, and the certified question answered in the negative.

Plaintiff, a food service deliveryman, was injured on December 24, 2003 when a sheet of plywood fell from a building under construction owned by defendant Seven Thirty One Limited Partnership. Plaintiff was compensated for treatment of his head, neck, and back injuries, as well as post-traumatic stress disorder and depression. While receiving workers' compensation (WC) benefits, plaintiff commenced this personal injury action in Supreme Court in 2004. The following year, in December 2005, while this action was pending, the insurance carrier for plaintiff's employer moved the Workers' Compensation Board (WCB) to discontinue plaintiff's benefits on the grounds that he was no longer disabled as a result of the accident. In January 2006, in a WC proceeding, an Administrative Law Judge (ALJ) reviewed the evidence and expert testimony submitted by the plaintiff and the insurance carrier. The ALJ found that Jose Verdugo no longer suffered any disability as of January 24, 2006 and terminated his benefits. Plaintiff appealed, but on February 1, 2007, a full panel of the WCB affirmed the finding that plaintiff's disability ended on January 24, 2006, and that plaintiff required no further medical treatment thereafter, other than for post-traumatic stress disorder.

In April 2009, the defendants in the instant personal injury{**20 NY3d at 1037} action moved to preclude plaintiffs from relitigating the duration of his work-related injury on the grounds that the issue was already fully litigated and decided in the WC administrative proceeding. While the motion was pending in Supreme Court, the plaintiffs' attorney commenced a separate Mental Hygiene Law article 81 proceeding to appoint a guardian for Jose Verdugo. This proceeding was uncontested and a guardian was appointed.
The doctrine of collateral estoppel is applicable to determinations of quasi-judicial administrative agencies such as the WCB (*Brugman v City of New York*, 102 AD2d 413, 415 [1st Dept 1984], *affd* 64 NY2d 1011 [1985]). Collateral estoppel applies if the identical issue sought to be precluded was necessarily decided in an earlier action, at which the party opposing preclusion had a full and fair opportunity to contest the issue (*id.* at 415-416). Although legal conclusions and conclusions of mixed law and fact are not entitled to preclusive effect, findings of fact that are necessary for an administrative agency to reach are entitled to such effect (*see Hinchey v Sellers*, 7 NY2d 287, 293 [1959]; *Matter of Engel v Calgon Corp.*, 114 AD2d 108, 110 [3d Dept 1986], *affd* 69 NY2d 753 [1987]). The issue disputed on this appeal is whether the WCB decided a necessary issue of fact about the duration of Jose Verdugo's disability and, if so, whether the plaintiffs had a full and fair opportunity to contest the determination (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

The determination of the WCB should be given preclusive effect as to the duration of plaintiff's disability, relevant to lost earnings and compensation for medical expenses. [*3]The issue of continuing benefits before the administrative agency necessarily turned upon whether Jose Verdugo had an ongoing disability after a certain date, which is a question of fact, as distinguished from a legal conclusion and a conclusion of mixed law and fact.

We also find that plaintiffs had a full and fair opportunity to litigate the issue of ongoing disability in the 2006 WC proceedings. Plaintiff was represented by counsel, submitted medical reports, presented expert testimony, and cross-examined the defendants' experts regarding the issue of whether or not there was an ongoing disability.

Plaintiffs attempt to use the guardianship order in this appeal to buttress the contention that Jose Verdugo is still disabled and argue that such an order raises an issue of fact as to the duration of his disability. We disagree. The issue of plaintiff's{**20 NY3d at 1038} incapacity was not opposed at the guardianship proceeding (in which defendants were not a party) and was based on evidence presented only by plaintiffs.

Chief Judge Lippman and Judges Graffeo, Read and Smith concur; Judge Pigott dissents and votes to affirm in an opinion; Judge Rivera taking no part.

Pigott, J. (dissenting).
Following workers' compensation hearings, held in March through May 2006, a Workers' Compensation Law Judge (WCLJ) ruled that plaintiff Jose Verdugo had no "causally related disability since January 24, 2006," the date on which benefits had been stopped pending the proceeding. The WCLJ refused to credit the testimony of a neurologist and a psychiatrist that Verdugo suffered from disorders that include post-concussion syndrome, depression, and post-traumatic stress disorder, and is "totally disabled." Both experts had testified that Verdugo had extreme anxiety about walking, with one specifying that his agitation was especially strong near construction sites.

On appeal, the Workers' Compensation Board (WCB) rescinded the denial of Verdugo's claim of post-traumatic stress disorder, but denied his claims of depression and for injuries to the head, neck, and back, accepting the WCLJ's credibility determinations. The Board concluded that Verdugo "had no further disability after January 24, 2006 and no further need for treatment."

Based on the Board's ruling, defendants seek to estop Verdugo from litigating the issue of whether he "was no longer disabled after January 24, 2006," in a personal injury action. The majority holds that Verdugo is precluded from litigating the duration of his work-related disability, "relevant to lost earnings and compensation for medical expenses" (majority mem at 1037).[FN*]The majority implicitly allows that Verdugo may still litigate lost earnings and medical [*4]expenses from the accident date to January 24, 2006, as well as all *other* consequences of defendants' alleged negligence after January 24, 2006, whether it be ongoing pain and suffering, loss of enjoyment of life and his wife's claim for loss of society and companionship. I would hold that litigation may proceed on the issue of Verdugo's ability to work, as well as the other consequences of the alleged negligence.

It is well-settled that, while factual issues that are "necessarily decided in an administrative proceeding are given collateral estoppel effect[,] . . . an administrative agency's final conclusion, characterized as an ultimate fact or a mixed question of{**20 NY3d at 1039} fact and law, is not entitled to preclusive effect" (*Akgul v Prime Time Transp.*, 293 AD2d 631, 633 [2d Dept 2002]; *see also e.g. O'Gorman v Journal News Westchester*, 2 AD3d 815 , 816-817 [2d Dept 2003]). The same is true, of course, of an administrative agency's purely legal conclusions. Such ultimate conclusions "are imbued with policy considerations as well as the expertise of the agency" (*Matter of Engel v Calgon Corp.*, 114 AD2d 108, 110 [3d Dept 1986]). The majority accepts the doctrine, observing that "legal conclusions and conclusions of mixed law and fact are not entitled to preclusive effect" (majority mem at 1037); but the majority fails to apply this principle to the case before us.

Here, the WCB reached a conclusion about whether Verdugo had an ongoing physical or psychological disability, preventing him from returning to his job—and nothing more. Disability for the purposes of workers' compensation is an ultimate conclusion. The question that the Board was asked to decide, on which Verdugo's receipt of benefits depended, was whether he could return to work—a very narrow issue dependent on type of work and a claimant's present condition vis-à-vis that occupation. If that is not an ultimate conclusion, it's difficult to think what would be.

Moreover, a workers' compensation disability determination requires "great discretion in [the Board] to rule . . . based on what considerations the [Board] believes are most appropriate" (*Engel*, 114 AD2d at 110). A determination concerning work-related disability is imbued with the policy considerations of the WCB, and for that reason cannot be the basis of collateral estoppel. The decision of the WCB relieves the compensation carrier of any further payments under its policy for the time being and therefore truncates any lien recovery that might flow from the personal injury action. The suggestion that this administrative decision means anything more is misguided.

Furthermore, in my view, the disability issue itself is a mixed question of law and [*5]fact. Our analysis of mixed questions has its origins in the criminal law, where we have defined a mixed question as one in which both a question of fact and a question of law are found, "the truth and existence of the facts and circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute [a particular legal concept] being a question of law" (*People v Oden*, 36 NY2d 382, 384 [1975] [analyzing probable cause]). The same analysis applies here.{**20 NY3d at 1040} The WCB had to reach a conclusion based on both questions of fact, such as whether Verdugo had a particular injury to the brain or body, and a question of law, namely whether the facts amounted to a disability preventing Verdugo from returning to his work. The conclusion that Verdugo was not disabled, i.e., was able to work again, is a mixed question requiring a legal determination based on the facts.

Finally, the majority's decision fails to consider the practical short-cuts in reasoning that are employed by Workers' Compensation Law judges—including here, where the WCLJ precluded one psychiatrist's testimony on technical grounds, and gave short shrift to another's because the WCLJ thought he had found an

inconsistency concerning the degree to which Verdugo feared construction sites. Verdugo had visited the psychiatrist's office despite construction in progress in the vicinity. Since the expert did not claim that Verdugo becomes paralyzed when walking near construction sites, but only that he grows very anxious and frightened, there simply is no inconsistency.

As the amicus expresses it, a "simple trip . . . to a Workers' Compensation Hearing will demonstrate the wisdom of the Appellate Division majority's decision."

For all these reasons, the case law requires us to rule that the WCB's finding that Verdugo could return to work does not preclude litigation of the issue, and therefore I would affirm the Appellate Division's order. Accordingly, I respectfully dissent.

Order reversed, with costs, defendants' motion to preclude plaintiffs from litigating the issue of plaintiff Jose Verdugo's accident-related disability beyond January 24, 2006 granted, and certified question answered in the negative, in a memorandum.

Footnotes

Footnote *: Plaintiffs are Maria Verdugo and Maria Auqui, who is the guardian of Jose Verdugo.

Footnote *: Given the WCB's determination that medical benefits are required for post-traumatic stress disorder, its ruling does not preclude litigation of that claim, as the majority appears to concede (*see* majority mem at 1036).

Auqui v Seven Thirty One Ltd. Partnership

2011 NY Slip Op 02725 [83 AD3d 407]

April 5, 2011

Appellate Division, First Department

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As corrected through Wednesday, June 8, 2011

Maria Auqui et al., Appellants,
v
Seven Thirty One Limited Partnership et al., Respondents.

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellants.

Fabiani Cohen & Hall, LLP, New York (Joseph J. Rava of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 7, 2009, which, insofar as appealed from, as limited by the briefs, granted defendants' motion to preclude plaintiffs from litigating the issue of plaintiff Jose Verdugo's accident-related disability beyond January 24, 2006, reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about December 8, 2009, which, inter alia, upon granting reargument and renewal, adhered to the prior determination, unanimously dismissed, without costs, as academic.

The motion court erred in according collateral estoppel effect to the determination of the Workers' Compensation Law Judge that plaintiff's post-January 24, 2006 disability was not causally related to his December 24, 2003 accident. The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries (including head, neck and back injuries, and depression and posttraumatic stress disorder, which are not disputed, and which were caused when plaintiff was struck in the head by a falling sheet of plywood in the course of his employment) is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that "an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of fact and law, is not entitled to preclusive effect" (*Akgul v Prime Time Transp.*, 293 AD2d 631, 633 [2002]; *see Tounkara v Fernicola*, 63 AD3d 648 [2009] [no identity of issues between proceeding before Workers' Compensation Board, which involved determination of whether party was plaintiff's employer for purposes of workers' compensation coverage, and third-party action, which involved determination of whether party was plaintiff's employer for purposes of indemnification provision]). The agency's determination on ultimate facts, as opposed to mere evidentiary facts, is imbued with policy considerations as well as the agency's expertise (*see Matter of Engel v Calgon Corp.*, 114 AD2d 108, 110 [1986], *affd* 69 NY2d 753 [1987]). Therefore, the Workers' Compensation Board's determination is not entitled to preclusive effect because it involved the [*2]ultimate issues of disability and proximate cause, which were committed to the Board's discretion. Indeed, the October 13, 2009 guardianship order that was the partial basis for plaintiffs' renewal motion raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion.

Concur—Mazzarelli, J.P., DeGrasse and Manzanet-Daniels, JJ.

Sweeny and Catterson, JJ., dissent in a memorandum by Catterson, J., as follows:

Because I believe that the duration of plaintiff's disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits, he should be precluded from relitigating the issue of continuing disability in this personal injury action. Furthermore, in my opinion, the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended. Therefore, I respectfully dissent.

The plaintiff, a food service deliveryman, was injured on December 24, 2003 when a sheet of plywood allegedly fell from a building under construction owned by defendant Seven Thirty One Limited Partnership. Defendant Bovis Lend Lease LMB, Inc. was the construction manager, and defendant Northside Structure, Inc. was the concrete superstructure subcontractor. The plaintiff's claim for Workers' Compensation (hereinafter referred to as WC) benefits was approved, and he was compensated for treatment of his head, neck, and back injuries, as well as posttraumatic stress disorder and depression. While receiving benefits, the plaintiff commenced this personal injury action in Supreme Court in 2004.

The following year, in December 2005, while this action was pending, the insurance carrier for the plaintiff's employer moved the WC Board to discontinue plaintiff's benefits on the grounds that he was no longer disabled from the accident. In the January 2006 WC proceeding, the Administrative Law Judge (hereinafter referred to as ALJ) reviewed the evidence and expert testimony submitted by the plaintiff and the insurance carrier. The ALJ found that the plaintiff no longer suffered any disability as of January 24, 2006 and terminated his benefits. The plaintiff appealed, but on February 1, 2007, a full panel of the WC Board concluded that the plaintiff was no longer disabled as of January 24, 2006, and required no further treatment.

In April 2009, the defendants in the instant personal injury action moved to preclude the plaintiff from relitigating the duration of his work-related injury on the grounds that the issue was already fully litigated and decided in the WC administrative proceeding. While the motion was pending in Supreme Court, the plaintiff's attorney commenced a separate Mental Hygiene Law article 81 proceeding to appoint a guardian for the plaintiff. On October 7, 2009, Supreme Court granted the defendants' motion to preclude.

Based on uncontested evidence of incapacity, the plaintiff's sister-in-law and wife were appointed as coguardians on October 13, 2009. The plaintiff then moved for leave to renew and/or reargue the defendants' motion in Supreme Court on the grounds that, inter alia, the guardianship order raised a triable issue of fact with regard to the plaintiff's ongoing work-related disability. By order and decision dated December 3, 2009, Supreme Court granted the plaintiff's motion, but nonetheless adhered to its earlier determination that the plaintiff was precluded from relitigating his ongoing disability.

On appeal, the plaintiff argues that Supreme Court erred because there is no identity of [*3]issues between the causation element in a WC determination and proximate cause in a personal injury claim. In addition, the plaintiff asserts that Supreme Court further erred because the appointment of a guardian raises a triable issue of fact with regard to the plaintiff's ongoing disability.

The defendants argue that the WC determination that the plaintiff's disability ended on January 24, 2006 was factual and identical to the issue in the personal injury action, and, further, that the plaintiff had a full and fair opportunity to litigate that question before the ALJ. Therefore, he should be precluded from relitigating whether his disability extended beyond that date. For the reasons set forth below, I agree with the defendants.

The doctrine of collateral estoppel is applicable where the issue in the current litigation is identical to a material issue decided in a prior proceeding, and the party to be precluded had a full and fair opportunity to litigate the

issue in that proceeding. (*Ryan v New York Tel. Co*., 62 NY2d 494, 500-501 [1984]; *Matter of Abady*, 22 AD3d 71 , 81 [1st Dept. 2005].)

It is well settled that a final determination by a quasi-judicial administrative agency may be accorded preclusive effect. (*Ryan*, 62 NY2d at 499.) The Workers' Compensation Board has been deemed to be such a quasi-judicial administrative agency. (*See e.g. Rigopolous v American Museum of Natural History*, 297 AD2d 728 [2d Dept 2002]; *Lee v Jones*, 230 AD2d 435 [3d Dept 1997], *lv denied* 91 NY2d 802 [1997]; *Matter of Maresco v Rozzi*, 162 AD2d 534 [2d Dept 1990].)

Although an agency's ultimate conclusion of mixed law and fact is not entitled to preclusive effect, collateral estoppel may be applied to determinations of specific evidentiary facts essential to that conclusion. (*Matter of Engel v Calgon Corp*., 114 AD2d 108, 111 [3d Dept 1986],*affd* 69 NY2d 753 [1987], citing *Hinchey v Sellers*, 7 NY2d 287 [1959]; *see e.g. Ryan*, 62 NY2d at 502 [while the ultimate fact of misconduct was not entitled to collateral estoppel effect, determinations of material factual issues by the ALJ in the plaintiff's unemployment claim precluded relitigation of those issues in his wrongful discharge action].)

Here, the evidentiary fact necessarily determined in the WC proceeding was that the plaintiff was no longer disabled *at all* beyond January 24, 2006. The decision of the ALJ clearly indicates that the plaintiff's claim of continuing disability was rejected because he failed to present sufficient medical evidence to show any disability after that date. Observing that the plaintiff's cane appeared to be "merely a prop," the ALJ credited the defendants' orthopedic expert opinion that the plaintiff's test results were normal and necessarily rejected the testimony of the plaintiff's neurologist. Furthermore, the ALJ completely discounted the plaintiff's treating psychiatrist's opinion that the plaintiff suffered permanent psychiatric disability, noting that inconsistencies in the doctor's responses rendered his testimony not credible.

Determination of the duration of the plaintiff's work-related disability was material and the very point of the WC proceeding, and is the exact issue that the defendants seek to preclude the plaintiff from litigating in the personal injury action. Additionally, the plaintiff's representation by an attorney, presentation and cross-examination of expert testimony, and submission of medical reports, assured that he had a full and fair opportunity to litigate the issue.

In my opinion, the majority is mistaken in its characterization of the ALJ's determination[*4]as an ultimate fact involving disability and proximate cause. An agency's determination of an ultimate fact as opposed to a "pure or evidentiary fact[ ]" is based upon analysis of "unique, and often times complex, statutes and regulations which apply specifically to [that agency]." (*Engel*, 114 AD2d at 110.)

That is not the case here. There is no indication that the ALJ considered causation at all much less that the decision analyzed causation in the specific context of WC claims. The defendants did not contest whether the plaintiff's injuries were related to an on-the-job accident, or offer any proof that his claimed disability was caused by a prior non-work-related incident. The ALJ did not interpret complex statutes or regulations, but rather evaluated the credibility of each party's medical testimony to determine if the plaintiff was still disabled.

Nor is the duration of the plaintiff's disability an ultimate fact in the personal injury action. The length of time that a plaintiff is disabled is relevant to the quantum of damages, an evidentiary factual determination, not, as the plaintiff asserts, a mixed issue of law and fact involving proximate cause.

Moreover, the majority's reliance on *Engel*, *Akgul*, and *Tounkara* is entirely misplaced. The agency decisions at

issue in these cases all deal with the classification of parties based upon statutory definitions. (*See Tounkara v Fernicola*, 63 AD3d 648 , 650 [1st Dept 2009]; *Akgul v Prime Time Transp.*, 293 AD2d 631, 633 [2d Dept 2002]; *Engel*, 114 AD2d at 110-111 [the National Labor Relations Board's definition of the plaintiffs as employees did not preclude a finding that they were defined as subcontractors by the Division of Human Rights].) In Tounkara, the decision not to give collateral estoppel effect to a WC determination was also based on the fact that the third-party plaintiff to be precluded was not a party to the WC proceeding and therefore had no prior full and fair opportunity to litigate. (*Tounkara*, 63 AD3d at 650.) Here, there is a total identity of issues with regard to the factual determination of the duration of the plaintiff's disability, and this plaintiff had a full and fair opportunity to litigate at the WC proceeding.

Furthermore, the plaintiff's guardianship order does not raise a triable issue of fact with regard to the ALJ's determination, or have any bearing on the application of collateral estoppel in the personal injury action. The appointment of a guardian is a highly discretionary, flexible decision taking into account the individual needs of the incapacitated person, and his wishes and preferences. (*See* Mental Hygiene Law § 81.01.) In the plaintiff's article 81 proceeding, the appointment of his wife and sister-in-law as guardians was unchallenged and fully supported by the plaintiff. The same psychiatrist that testified before the ALJ also testified in the guardianship proceeding; however, in the guardianship proceeding there was no evidence required to rebut the plaintiff's claimed incapacity or show that his incapacity more than three years later was [*5]unrelated to the accident. As such, a determination of incapacity based upon the same testimony that was discredited by the WC ALJ does not raise a triable issue of fact warranting denial of the defendant's motion.