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COURT OF APPEALS

STATE OF NEW YORK

AUQUI,

Respondent,

-against-

No. 212

SEVEN THIRTY ONE LIMITED PARTNERSHIP,

Appellant.

20 Eagle Street
Albany, New York 12207
November 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We have a full
2 calendar today, so we're going to start with number
3 212, Auqui.

4 And counsel, would you like some rebuttal
5 time?

6 MR. MONTES: Five minutes, please, Your
7 Honor.

8 CHIEF JUDGE LIPPMAN: Five minutes of your
9 fifteen, sure, go ahead.

10 MR. MONTES: Good afternoon, may it please
11 the court, my name is Richard Montes. I'm an
12 attorney with the law firm of Mauro Lilling, the
13 party who represent the defendants in this action.

14 With the exception of one factual
15 correction upon which the parties now agree, this
16 court should adhere to its February decision for four
17 reasons. First, this court's decision is nothing
18 more than the consistent application of well-
19 established law. For decades, this court has held
20 that quasi-judicial determi - - - factual
21 determinations made by - - -

22 CHIEF JUDGE LIPPMAN: Counsel, what - - -
23 what is determined at a Workmen's Compensation
24 hearing in this kind of case, in terms of disability?
25 What - - - what is - - - what is determined?

1 MR. MONTES: This is a termination
2 proceeding, Your Honor, and - - -

3 CHIEF JUDGE LIPPMAN: And how does it
4 differ - - - let me - - - let me - - -

5 MR. MONTES: Sure.

6 CHIEF JUDGE LIPPMAN: Let me point to the
7 question obviously that - - - that we're going to ask
8 you. How does it differ from the kind of decision
9 that's made in a - - - a negligence lawsuit?

10 MR. MONTES: Well, I think the issue is
11 identical, which is why collateral estoppel - - -

12 CHIEF JUDGE LIPPMAN: Tell me why it's
13 identical.

14 MR. MONTES: Okay.

15 CHIEF JUDGE LIPPMAN: Why - - - why - - -
16 what is the argument for it being the exact same
17 issue?

18 MR. MONTES: Okay. In a termination
19 proceeding, the issue is whether or not the
20 individual has recovered from the injuries that
21 they're alleged - - - that they allege to have.

22 JUDGE PIGOTT: Recovered from or they're go
23 - - - they're now able to work?

24 MR. MONTES: It's recovered. It's a
25 complete recovery, because on the other side what we

1 had was you had the carrier saying - - -

2 JUDGE PIGOTT: If you have - - - if you
3 have an emp - - - a worker who loses a leg - - -

4 MR. MONTES: Okay.

5 JUDGE PIGOTT: - - - and the Workers'
6 Compensation board now says that, you know, since
7 they were - - - they had a desk job, they're now
8 fully recovered, to use your word. Do they have a
9 cause of action again - - - in negligence against the
10 person who caused them to lose their leg?

11 MR. MONTES: They still would have a
12 negligence cause of action. The question would be
13 whether or not they can continue to pursue the lost
14 earnings and future medical expenses, and that's what
15 - - - a Workers' Comp does both.

16 JUDGE PIGOTT: So you're saying that - - -
17 that even though they - - - the negligent person is
18 responsible for the loss of leg and that plaintiff
19 can prove that in the future he's going to need new -
20 - - new prosthesis or he's going to suffer some pain
21 and suffering; has lost a certain amount of enjoyment
22 of life, that all of that is cut off by the Workers'
23 Compensation board saying, you are now able to return
24 to work.

25 MR. MONTES: Well, not in the personal

1 injury action. If you're referring to the Workers'
2 Compensation board, if you're - - -

3 JUDGE SMITH: You - - - you - - - as I
4 understand it, you're not saying that's cut off.

5 MR. MONTES: No, not at all.

6 JUDGE SMITH: Pain - - - pain and suffering
7 is fine, the prosthesis is fine. Just the lost wages
8 and the medicals.

9 MR. MONTES: That's correct. If the
10 determination - - -

11 CHIEF JUDGE LIPPMAN: So what about a
12 question like what we have here: the duration of the
13 injury?

14 MR. MONTES: Right.

15 CHIEF JUDGE LIPPMAN: I - - - I - - - is -
16 - - is that what they decided at Workmen's Comp, or
17 is it just when you were able to receive benefits?

18 MR. MONTES: No, they decided the duration
19 in the injury, because you had their experts claiming
20 permanent total disability, and that's a critical
21 distinction between - - - with this case and maybe
22 others that might come after in - - - in your
23 example, Judge Pigott. When you're claiming
24 permanent total disability, you're claiming the
25 inability to return to work in any capacity.

1 JUDGE PIGOTT: That would - - - that would
2 differ from, let's say, a permanent partial
3 disability, which is getting back to my - - - my
4 prosthetic thing. So when you go forward - - - when
5 - - - when this case goes forward in Supreme Court
6 for negligence, they can prove conscious pain and
7 suffering from the date of the injury until whatever
8 jury finds there's no longer conscious pain and
9 suffering, right?

10 MR. MONTES: That's correct. The - - -

11 JUDGE PIGOTT: They can also prove loss of
12 - - - loss of wages up to the point where the
13 Workers' Compensation board said you were now able to
14 return to work, and in your view they would be
15 estopped from proving lost wages going forward from
16 there.

17 MR. MONTES: That's correct.

18 JUDGE PIGOTT: Now with respect to medical,
19 they could still prove that they need medical in the
20 future, it's just that the - - - the Workers'
21 Compensation board didn't order it, and the insurer
22 wouldn't pay for it. Maybe somebody else, namely the
23 defendant, might, correct?

24 MR. MONTES: Well, I would disagree with
25 that last piece, Your Honor, because when you're

1 deciding medical benefits, under Section 13 of the
2 Workers' Compensation Law, a carrier has an
3 obligation to provide medical care and treatment for
4 the duration of the injury or the process the
5 recovery requires.

6 JUDGE PIGOTT: Where does 123 fit into
7 that?

8 MR. MONTES: Section 1 - - - let me make
9 three points just to Section 123. First I don't
10 think it's properly before this court, because it
11 wasn't raised before this court in the - - - in the
12 original instance, and here we are in reargument
13 discussing Section 123.

14 But beyond Section 123, whether it's
15 properly before the court, this court decided in
16 Werner that Section 123 does not eliminate the
17 finality of the order, such that this order is still
18 considered final until it's reversed or modified
19 either on appeal, or in an application reorder.

20 JUDGE SMITH: Werner - - - Werner wasn't a
21 collateral estoppel case; Werner was an election of
22 remedies case, wasn't it?

23 MR. MONTES: But what the important part of
24 Werner is that it addressed both the question of when
25 something is final and when something is exclusive.

1 And the finality piece of that was specifically to
2 say that Section 23 of the Workers' Compensation Law
3 says that all orders of the Workers' Compensation
4 board are deemed final until reversed and modified on
5 appeal, and then it took the phrase "on appeal" to
6 mean, also Section 123, the ability to reopen.

7 CHIEF JUDGE LIPPMAN: Counsel - - -

8 JUDGE RIVERA: But isn't that just saying
9 it's final until it's not final?

10 MR. MONTES: That's the way, Your Honor,
11 that the law has actually been since the early 1800s.

12 CHIEF JUDGE LIPPMAN: Counsel, tell - - -
13 tell us about your procedures, though, as opposed to
14 a suit at law. Do you have all the - - - the
15 procedural and due process protections at a Workmen's
16 Compensation proceeding? Are they analogous? Does -
17 - - does one have a real chance to litigate this
18 fully in a Workmen's Compensation proceeding?

19 MR. MONTES: Absolutely, Your Honor, and
20 this court has already held that you have - - - all
21 those procedures are sufficient. We only have to be
22 substantially similar. You don't have to be exact.
23 And because this court already held in Liss, already
24 held in Werner, already held in O'Connor, that
25 collateral estoppel can apply to Workers'

1 Compensation's proceedings, this court's already held

2 - - -

3 CHIEF JUDGE LIPPMAN: Well, I think that
4 there are - - -

5 MR. MONTES: - - - that the standards are
6 similar.

7 CHIEF JUDGE LIPPMAN: - - - two issues
8 here. One is, is there - - - are there identical
9 issues?

10 MR. MONTES: Right.

11 CHIEF JUDGE LIPPMAN: And the second is a
12 fairness issue. Is it fair to preclude based on a
13 Workmen's Compensation - - -

14 MR. MONTES: Right.

15 CHIEF JUDGE LIPPMAN: - - - proceeding?
16 Your - - - your view on the second issue is that it
17 is fair and it's totally - - - you have had your
18 opportunity and it's - - - it's fair in the - - - in
19 the most generic sense of that - - -

20 MR. MONTES: Right.

21 CHIEF JUDGE LIPPMAN: - - - to be precluded
22 from - - - from contesting this in a - - - in a law
23 suit?

24 MR. MONTES: Let me see if I can answer the
25 question in - - - in - - - both parts of your

1 question with one answer - - -

2 CHIEF JUDGE LIPPMAN: Sure.

3 MR. MONTES: - - - which would be, let's
4 imagine we took this case out of Workers'
5 Compensation. We moved it up to Vermont. We had the
6 exact same testimony. The carrier says fully
7 recovered from the injury and the plaintiff says
8 permanent total disability; I can't work in any
9 capacity, and I need lifetime medical care.

10 If the jury went through and made the same
11 factual determinations that the Workers' Compensation
12 Law Judge made, would there be any question that
13 they'd be precluded from bringing an action in New
14 York?

15 JUDGE PIGOTT: Let's - - - let's look at it
16 a different way. One of the amicus, I think, raised
17 the issue that if - - - if we agree with you - - -

18 MR. MONTES: Um-hum.

19 JUDGE PIGOTT: - - - now, it might be a
20 smart legal move for the attorneys for the injured
21 plaintiff not to seek Workers' Compensation - - -

22 MR. MONTES: Right.

23 JUDGE PIGOTT: - - - because all it is, is
24 a lien. And so if they don't ask for it, and can
25 find a way to exist through - - - and including the

1 jury, they don't have this problem at all. And are -
2 - - and is that a danger if we find in - - - in your
3 favor that we're going to discourage people from
4 getting the Workers' Compensation benefits they
5 deserve?

6 MR. MONTES: I think the policy concerns
7 that have been raised are largely based on a
8 misunderstanding of the scope of this court's
9 decision. This court's decision is not a blanket
10 rule that duration of disability is always going to
11 be given collateral estoppel effect in a future
12 proceeding. The law has always been that you do - -
13 - there are no rigid rules. There's no mechanical
14 formula. It's a case by case - - -

15 JUDGE PIGOTT: Yeah, but a lot of people -
16 - - a lot of people on your side - - -

17 JUDGE GRAFFEO: Well, follow - - -
18 following that line - - -

19 JUDGE PIGOTT: No, go ahead.

20 JUDGE GRAFFEO: Following that line of
21 reasoning that it's flexible, the claimant in this
22 case then became the subject of an Article 81
23 proceeding, correct?

24 MR. MONTES: Correct.

25 JUDGE GRAFFEO: Well, would that be a

1 reasonable basis to not apply collateral estoppel?
2 Does that fall under the terminology of newly
3 discovered evidence?

4 MR. MONTES: Not in this instance, because
5 the Article 81 proceeding, as this court already
6 held, didn't have before it the same information that
7 the Workers' Compensation Law judge had. So we don't
8 know if Judge Shafer or the court evaluator would
9 have reached a different determination if they had
10 available Dr. Zaretsky - - -

11 JUDGE SMITH: The - - - the Article 81 was
12 essentially uncontested?

13 MR. MONTES: Yes. And it's not - - - it's
14 not - - - I think during the last oral argument it
15 was acknowledged that the Workers' Compensation Law -
16 - - I mean, sorry - - - that the administrative law
17 judge and the court evaluator didn't have the
18 Workers' Compensation - - -

19 JUDGE GRAFFEO: But there's - - - but
20 there's obviously been some change in his either
21 medical or mental situation to end up the subject of
22 an Article 81.

23 MR. MONTES: I'm not sure - - - Your Honor,
24 I'm not sure we can reach that conclusion, because if
25 they had the same information before them that the

1 Workers' Compensation Law judge had, which is Dr.
2 Zaretsky, Dr. Francois (ph.), and Dr. Kuhn, and
3 what's significant is Drs. Zaretsky and Francois
4 essentially reached the same conclusion: no head,
5 neck, and back injury. No MRIs, no objective
6 evidence of the injuries that - - -

7 JUDGE RIVERA: But - - - but - - - but they
8 argue that they weren't able to put in all their
9 information, that they were specifically prohibited
10 from doing so, which strikes me as different, in any
11 event, from your analogy to what's going on in a
12 judicial proceeding in Vermont.

13 MR. MONTES: Right. The question regarding
14 neuropsychological testing, there is absolutely no
15 evidence in this record of any formal request for
16 neuropsychological testing. There is no evidence in
17 this record that such a request was denied by the
18 Workers' Compensation Law judge.

19 In fact, if such a request had been made,
20 then it would have been the subject of their appeal
21 to the Workers' Compensation board, but if we look at
22 pages 239 and 241 where they made that request, they
23 didn't say to the board, we wanted this testing, but
24 it was denied; it was deprived of - - -

25 JUDGE SMITH: Under - - - under Section

1 123, could they have gone back to the board later,
2 and said, we got this test - - - you know, something
3 else has happened, and we want you to reopen the
4 case, and we think we're entitled to compensation
5 after all?

6 MR. MONTES: They could and they did, and
7 whether or not they did it based on this testing that
8 was available while the Workers' Comp proceeding was
9 going on is not clear to me.

10 JUDGE SMITH: But doesn't - - - but doesn't
11 that suggest a broader problem? The - - - you have a
12 - - - you have a Workers' Compensation Board ruling
13 to which you've given res judicata effect. The
14 plaintiff has lost whatever - - - whatever part of
15 his personal injury case he's going to lose, then he
16 goes back to the Workers' Comp board, and they - - -
17 and they essentially reconsider what they've already
18 done.

19 What about the comp carrier? Doesn't - - -
20 I mean, did you - - - your adversary makes a point
21 that the carrier has a - - - I mean, when something
22 is reopened and there's a new award, the carrier's
23 going to have no source to satisfy his lien from.

24 MR. MONTES: Right. I think the answer to
25 that, Your Honor, is that they're not left - - - left

1 without a remedy. If the action is going on and you
2 have a claim that you've made - - - you're made to
3 reopen, then move for a stay. If that stay is
4 denied, that becomes an issue - - -

5 JUDGE ABDUS-SALAAM: But what if the action
6 is completed? What about the Casas case?

7 MR. MONTES: If the - - - right. In the
8 Casas case, that case is not complete if this court
9 actually denied leave because over the lack of
10 finality, which now gives them the opportunity to go
11 back and renew, and that motion to renew is pending.
12 But even if the case had been closed, and let's say
13 our case is closed, it's not clear to me why they
14 wouldn't have a right under CPLR Section 5015(a)(5)
15 which says - - -

16 JUDGE PIGOTT: But you're - - - you - - -
17 you - - -

18 MR. MONTES: - - - that an order or a
19 judgment can be vacated where the underlying order or
20 judgment has been reversed or modified.

21 JUDGE PIGOTT: You're building a - - - a
22 structure of procedure that could be satisfied, I
23 think your - - - your opponent would argue, by saying
24 this is some evidence. This is what the Workers'
25 Compensation board did; bring it front of a jury.

1 The lien will or will not be - - - will be there for
2 sure - - - and then you're done, rather than saying,
3 you know, go back and redo everything.

4 MR. MONTES: Right.

5 JUDGE PIGOTT: Wouldn't that make more
6 sense?

7 MR. MONTES: But the law has al - - - has
8 been since the ear - - - since the 18 - - -

9 JUDGE PIGOTT: I take that as a no.

10 MR. MONTES: Yeah, no.

11 JUDGE PIGOTT: Okay.

12 MR. MONTES: And I - - - I don't mean to
13 say it like that, Your Honor.

14 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
15 have your rebuttal time.

16 MR. MONTES: Okay, I apologize.

17 CHIEF JUDGE LIPPMAN: Thanks.

18 MS. HASAPIDIS: May it please the court,
19 I'm Annette Hasapidis, appearing for the plaintiff,
20 Jose Verdugo on behalf - - - through his wife, Maria
21 Verdugo.

22 CHIEF JUDGE LIPPMAN: Counsel, let's talk
23 first about, is there an identity of issues?

24 MS. HASAPIDIS: There is not an identity of
25 issues.

1 CHIEF JUDGE LIPPMAN: Why not? Explain
2 why.

3 MS. HASAPIDIS: The Workers' Compensation
4 guidelines define impairment, and impairment is a
5 medically documented loss of use. The guidelines go
6 on to state that a disability is distinct from
7 impairment. A dis - - - a finding of disability is -
8 - - is a determination based upon the scope and the
9 mandate of the proceedings.

10 JUDGE PIGOTT: But what is - - -

11 MS. HASAPIDIS: When Mr. Verdugo - - -

12 JUDGE PIGOTT: What's going to happen in
13 this trial if we find in your favor? Aren't these
14 same four doctors or however many going to come in
15 testify exactly to what they testified at the
16 Workers' Compensation board, and aren't you then
17 going to ask the jury to make exactly the finding you
18 asked the Workers' Compensation board to do?

19 MS. HASAPIDIS: They will not, because Mr.
20 Verdugo is not as restrained in the personal injury
21 action as he has been in this action. As a matter of
22 fact, in the opening brief of - - - before this court
23 the first time, we identified a list of approximately
24 twenty physicians who would testify on Mr. Verdugo's
25 behalf, one of whom included a neuropsychiatrist.

1 Neuropsychiatric testing is what was necessary to
2 identify the deficit in Mr. Verdugo's behavior.

3 But turning back to the issue of identity
4 of issues, the purpose of the Workers' Comp
5 proceeding is to determine an ability to return to
6 work at the present time. And it - - - counsel has
7 said this was an ability to return to work - - -

8 CHIEF JUDGE LIPPMAN: We're not determining
9 duration of injury?

10 MS. HASAPIDIS: It is not. As a matter of
11 fact, Mr. - - - Dr. Kuhn testified at page 177 to 178
12 that Mr. Vertugo was "totally disabled then and is
13 still totally disabled today." There is no - - -

14 JUDGE PIGOTT: Who said that?

15 MS. HASAPIDIS: I'm sorry?

16 JUDGE PIGOTT: Who said that?

17 MS. HASAPIDIS: Dr. Kuhn. There is no
18 mandate and there is no indication in the Workers'
19 Compensation Law that when an in - - - when an
20 injured worker - - - worker is call to a hearing for
21 a termination of benefits, that he's obligated to put
22 on evidence of his future injuries and damages. That
23 never occurs here. It's on - - - the mandate of the
24 WCLJ in these proceedings is to determine whether or
25 not Mr. Verdugo could return to work at that

1 particular time.

2 JUDGE SMITH: Okay, but all - - - but - - -
3 as I understand it, all your adversary is saying,
4 okay, the question is can he return to work. The
5 Workers' Compensation board said yes, so now you
6 can't come over here and get lost earnings from me.

7 MS. HASAPIDIS: Well, the - - - the problem
8 with that is that you - - - that we're setting aside
9 and - - - and not paying - - - giving sufficient
10 weight to the issue of the lack of finality. There
11 is a statutory presumption against finality under the
12 Workers' Compensation Law.

13 JUDGE SMITH: Okay, before - - - but I
14 guess - - - but on that - - - before you get too deep
15 into that, are we allowed to consider that? Is it
16 okay for us to consider it, since it wasn't raised
17 last time around?

18 MS. HASAPIDIS: Yes, you are. I've
19 addressed that in the brief at pages 332 and 339 of
20 this record, trial counsel raised the issue of lack
21 of finality before the Supreme Court, and this court,
22 in the case of People ex rel. Cuomo v. Greenberg,
23 held that when an issue is properly raised in the
24 Supreme Court, even if it has not been raised at the
25 Appellate Division, it can be raised - - - addressed

1 by this court.

2 JUDGE SMITH: How about the failure to
3 raise it in the briefs before us the first time
4 around?

5 MS. HASAPIDIS: It was - - - it was raised
6 in the context - - - not directly - - - it was raised
7 in the context of this being a mixed question of law
8 and fact. And the arguments there was that this was
9 a mixed question of law and fact because the
10 determination is one in which the WCLJ decides
11 whether or not an individual is capable of returning
12 to work at the present time and whether or not the
13 individual has - - - it's not about whether or not
14 the individual has recovered from injury - - - from
15 his injuries for all time.

16 JUDGE PIGOTT: But if you - - - if you talk
17 about 123 at - - - when they go - - - when people go
18 back to the Workers' Compensation board, they're
19 saying, you said on - - - on this date that I was no
20 longer - - - that I was able to return to work. I'm
21 now petitioning, say, I'm not able anymore. Right?
22 In other words, you're not asking for a reargument.
23 You're saying - - -

24 MS. HASAPIDIS: That's correct.

25 JUDGE PIGOTT: - - - from - - - you know,

1 if in January you said this, well, three years ago
2 you said that. But now I'm - - - I'm disabled again,
3 and I - - - I should get covered. And that makes
4 sense.

5 But what Mr. Montes is arguing, if I
6 understand it right, is besides saying it wasn't
7 argued previously, is that the first decision is the
8 one. Don't - - - let's not worry about 123. Let's
9 worry about whether or not at that time he was able -
10 - - was disabled and - - - and not able to return to
11 work. And a major part of his argument seems to me
12 is that their doctors say your doctors are wrong, and
13 this guy's faking.

14 MS. HASAPIDIS: Well - - -

15 JUDGE PIGOTT: Somebody bought that.

16 MS. HASAPIDIS: First of all, as far as the
17 allegation of faking, the circumstances of this
18 accident leave no question that this man is lucky to
19 be alive. A four-by-eight sheet of plywood fell from
20 the fiftieth story of a construction site and landed
21 on this man's head with such force and impact that he
22 was knocked to the ground, and bystanders describe
23 the sound as gunfire. Page 445 of the record is an
24 article from the newspaper describing this. This man
25 is lucky to be alive.

1 So the assertion or the implication that
2 this man is faking flies in the face of logic, let
3 alone basic knowledge of medicine.

4 JUDGE SMITH: Suppose - - - suppose a
5 different - - - I mean, I'm - - - I have no doubt
6 that your - - - your client did suffer this - - -
7 this - - - this very serious accident. Suppose in a
8 hypothetical case - - - suppose a - - - the Workers'
9 Compensation board had found there was no accident.
10 Nothing ever hit him; he's making it up. And they
11 make that finding and close the case. Is he bound by
12 that? And is he - - - can he go and sue, or is he
13 bound by the Workers' Comp finding?

14 MS. HASAPIDIS: Your Honor, I would submit
15 to you that that is a factual, evidentiary
16 determination about how an accident occurred, and he
17 would be bound by that. He would not be able to
18 bring suit and - - - and sue another driver for
19 negligence and argue that the accident happened
20 because he was turning right when he - - - when a
21 determination was made in a Workers' Comp proceeding
22 that he was turning left.

23 JUDGE SMITH: And how is this case - - -

24 MS. HASAPIDIS: That is - - -

25 JUDGE SMITH: And how is this case

1 different from the hypotheticals you and I are
2 talking about?

3 MS. HASAPIDIS: Because the deter - - -
4 because the issue and the purpose of the testimony of
5 the physicians was whether or not he could return to
6 work at that particular time. The WCLJ had, as his
7 mandate in this proceeding, the goal of getting an
8 injured worker back to work as soon as possible,
9 notwithstanding his injuries, because the purpose of
10 the scheme is to provide him with the treatment and
11 the benefits he needs - - -

12 JUDGE PIGOTT: How does - - - how does that
13 - - -

14 MS. HASAPIDIS: - - - for so long as he
15 needs them. And then - - -

16 JUDGE PIGOTT: How does that - - - go
17 ahead; I'm sorry.

18 MS. HASAPIDIS: No, no. And then - - - and
19 so - - - and the WCLJ also knew - - -

20 CHIEF JUDGE LIPPMAN: At its heart, is that
21 the distinction?

22 MS. HASAPIDIS: Excuse me?

23 CHIEF JUDGE LIPPMAN: At its heart, is that
24 the distinction?

25 MS. HASAPIDIS: That is one of the

1 distinctions.

2 CHIEF JUDGE LIPPMAN: That's what happens
3 in the Workers' Comp instead of at a lawsuit.

4 MS. HASAPIDIS: That is one of the
5 distinctions. The other distinction is that the WCLJ
6 knows that if he's not satisfied with the proof, if
7 he doesn't think it's sufficient to demonstrate that
8 Mr. Verdugo was not capable of returning - - - of
9 returning to work at that time, he could tell them to
10 come back.

11 JUDGE PIGOTT: But - - -

12 MS. HASAPIDIS: The issue here was whether
13 or not - - - I'm sorry, Judge Pigott.

14 JUDGE PIGOTT: No, I'm - - -

15 MS. HASAPIDIS: The issue here was whether
16 or not he could perform the works of a restaurant
17 delivery person at that time.

18 CHIEF JUDGE LIPPMAN: Okay, Judge Pigott.

19 JUDGE PIGOTT: The Workers' Compensation
20 Law judge, you know, made comments about the cane and
21 comments about the construction going on around his -
22 - - the doctor's office, you know, because your guy
23 says - - -

24 MS. HASAPIDIS: Yes, yes.

25 JUDGE PIGOTT: Assuming you're right, and

1 anticipate that they'd be able to prove that - - - to
2 use that for any relevant purpose unless it was to
3 impeach some testimony. And I'd like to address
4 another - - -

5 JUDGE SMITH: Can they - - - can they - - -
6 can they ask the jury to find the exact opposite of
7 what the Workers' Compensation judge found? The
8 Workers' Compensation judge found he can work. You
9 would - - - you would still ask a jury in the tort
10 case to say - - - to find that he's totally disabled?

11 MS. HASAPIDIS: Well, the issue of
12 disability does not come up in the personal injury
13 action, so I wouldn't be - - - it would be - - -

14 JUDGE SMITH: Well, if you're seeking lost
15 wages, it does, doesn't it?

16 MS. HASAPIDIS: The jury is asked to find
17 whether or not the defendants had a duty, breached a
18 duty, and caused Mr. Verdugo damages as a result of
19 that breach and those - - -

20 JUDGE SMITH: Well, but aren't - - - well,
21 but - - - but - - - but isn't the - - - but lost
22 wages, lost earnings, future earnings are an element
23 of damages, right?

24 MS. HASAPIDIS: Correct, but it's not
25 disability - - -

1 JUDGE SMITH: Are you allowed - - - are you
2 allowed to argue to the jury, this man will never
3 work again, when a Workers' Compensation Law judge
4 has just found that he will?

5 MS. HASAPIDIS: Yes, because disability in
6 the context of Workers' Compensation is a fluid
7 concept and the determination made at that time in -
8 - - on - - - in the January 24th, 2006 proceeding was
9 his ability to return at the time.

10 CHIEF JUDGE LIPPMAN: What is the nature of
11 the Workmen's Compensation proceeding? Is it
12 fundamentally different or if the issues are
13 identical, they're identical and that's the end of
14 it?

15 MS. HASAPIDIS: No, they're not. And I
16 would like to point this court to two cases from this
17 court, where this court has acknowledged the very
18 real difference between the nonfinality of Workers'
19 Compensation proceedings and the finality of a tort
20 action. And those cases are the Bissell's - - -
21 Bissell case and the Burns case.

22 In the Bissell case, there was a jury
23 verdict of thirty million dollars rendered in favor
24 of the plaintiff. The plaintiff came before this
25 court, and said, I would like the carrier to pay its

1 proportionate share of litigation costs in securing
2 my future medical expenses award, because after all,
3 all you need now is an actuary. Here's my futu - - -
4 future medical expenses award; let the carrier pay
5 its share.

6 And Judge Pigott, you wrote for the
7 unanimous panel in the case. And - - -

8 JUDGE PIGOTT: Yeah, but I haven't been
9 doing well in Workers' Compensation cases.

10 MS. HASAPIDIS: And Judge Pigott, you said
11 "There is a distinction between a nonspeculative
12 future medical expenses award made by a jury and the
13 benefit that the carrier receives in Workers'
14 Compensation as a byproduct of the award." You went
15 on to point out that in a third party action, a
16 plaintiff has one opportunity to prove liability and
17 fix damages for all time.

18 And that the carrier, by contrast, in the
19 Workers' Compensation proceeding, can "wait and see
20 what happens", such that it would be unfair to tie
21 the carrier's share - - - to tie the carrier's
22 obligation to pay a share of litigation costs based
23 upon the jury's verdict.

24 And this court said, we shouldn't do that
25 to the carrier, because they're different

1 proceedings. And the carrier's share of litigation
2 costs should be based upon the amount of medical
3 expenses and other benefits it pays to Mr. Bissell in
4 the Workers' Comp proceeding.

5 JUDGE RIVERA: All right. I - - - perhaps
6 I'm mi - - - I think I'm not understanding your
7 argument related to - - - to the Workers' Comp
8 proceeding. So le - - - if I'm - - - you can just
9 clarify this for me, please.

10 MS. HASAPIDIS: Certainly.

11 JUDGE RIVERA: So are you saying that the
12 damages determination is one made just in the moment
13 in that proceeding, the counsel - - - you, in this
14 example - - - is not incentivized to present evidence
15 that there's a permanent disability, because the
16 question is just in that moment, whether or not,
17 right now someone is disabled?

18 MS. HASAPIDIS: No, of - - -

19 JUDGE RIVERA: I'm not understanding that.

20 MS. HASAPIDIS: No. Of course, no. In a
21 personal injury action, you present evidence of past
22 and future damages.

23 JUDGE RIVERA: Yes, no, but I'm talking
24 about the Workers' Comp.

25 MS. HASAPIDIS: In a Workers' Comp, there -

1 - - there is not - - - that requirement is not there,
2 because Workers' Compensation Law 13 - - - Section 13
3 says, that once we've determined that you're not
4 capable of returning to work now - - -

5 JUDGE RIVERA: Right.

6 MS. HASAPIDIS: - - - you're treating
7 physician has to report every twenty-two days about
8 the nature of your injuries and the nature of your
9 disability, and whether or not you are still
10 suffering an ongoing causally related disability.
11 The statutory framework contemplates that there's a
12 continuing obligation. And then what - - -

13 JUDGE RIVERA: So - - - so you're trying to
14 say there's nothing in the statute that sets up the
15 type of proceeding where you would present the type
16 of evidence that you would in the personal injury
17 case, to show the permanent disability.

18 MS. HASAPIDIS: That's correct. It's quite
19 the opposite. The statutory framework contemplates
20 an ongoing obligation by the injured worker to
21 demonstrate that he remains injured.

22 JUDGE RIVERA: Okay, but - - - but if you
23 have the - - - if you have that kind of evidence, why
24 would that not be the evidence you would continue to
25 present? I - - - see, this is what I'm not

1 understanding.

2 MS. HASAPIDIS: You would - - - you would.

3 JUDGE RIVERA: You have the evidence of the
4 permanent disability. That would certainly satisfy
5 the standard that you're setting out in - - - in the
6 Workers' Comp setting. Why would you present
7 something less?

8 MS. HASAPIDIS: It's not less. It's just -
9 - - it's - - - it's not - - - the - - - the evidence
10 that has to be presented in the Workers' Comp setting
11 has to be presented through the authorized
12 physicians, based upon authorized medical treatment.
13 In a personal injury action, you're not so bound.
14 Mr. Verdugo is not bound in his personal injury
15 action from presenting far more evidence.

16 I - - - the other case I referred the court
17 to was Burns v. Varriale. And in that case, the
18 plaintiff there has secured a settlement in his
19 personal injury action, and he had been determined to
20 be permanently and partially disabled.

21 And again, he came to this court, and said,
22 look, what's the - - - what's the difference between
23 the two proceedings? I've got my settlement. I've
24 got - - - I'm a permanent partial disability - - -
25 I've got a permanent partial disability

1 determination. You can easily quantify what the
2 carrier's share of litigation costs are in this case.

3 And this court again said that the fact
4 that you're a permanently partially disabled is still
5 speculative, even at the time of your settlement,
6 such that we should - - - it's unfair to tether the
7 carrier's obligations in the Workers' Comp proceeding
8 to what happens in the personal injury action.

9 And the same - - - the con - - - the same
10 thing is true here. Because of the difference in the
11 proceedings and the ongoing nature of the
12 proceedings, one cannot tether Mr. Verdugo's personal
13 injury claim to what occurred in the Workers' Comp
14 proceeding.

15 JUDGE RIVERA: So that ongoing
16 responsibility to show that even though once you
17 showed - - - let's just say once you were able to
18 show - - - the permanent disability, you will
19 continue to have to come back.

20 MS. HASAPIDIS: Yes, unless it is a
21 permanent - - -

22 JUDGE RIVERA: - - - and show that.

23 MS. HASAPIDIS: Unless it is a permanent
24 and total disability. If it's a permanent partial
25 disability, like in the case of Mr. Casas - - -

1 JUDGE RIVERA: Yes.

2 MS. HASAPIDIS: I see my time's expired,
3 but I'd like to request - - -

4 CHIEF JUDGE LIPPMAN: Go ahead. Finish the
5 answer. Go - - -

6 MS. HASAPIDIS: Mr. Casas' case
7 demonstrates that the reason why revisiting this
8 decision is necessary. Mr. Casas' case in 2008 was -
9 - - his benefits were terminated for a finding of no
10 further causally related disability. The Workers'
11 Compensation Law doesn't distinguish between why the
12 benefits were terminated, whether it was credibility
13 of physicians or anything. They were both - - - they
14 - - - Mr. Casas' benefits were terminated in the same
15 manner for the same reason: no further causally
16 related disability.

17 Mr. Casas continued to receive medical
18 treatment outside of the Workers' Compensation scheme
19 and returned in 2008 to have his case reopened. The
20 case was reopened; surgery was authorized for his
21 back. In August of 2013, a few months ago, he was
22 determined to be permanently and totally disabled.

23 JUDGE SMITH: Are these facts that you
24 recited, are they on the record somewhere? Are they
25 or can we judicially notice them or where do we get

1 them?

2 MS. HASAPIDIS: They are in the record of
3 the First Department, and they were addressed in the
4 briefs and by the amicus at length.

5 JUDGE SMITH: The - - - the record of the
6 Casas case?

7 MS. HASAPIDIS: Well, the - - - the facts
8 pertaining to the Casas case were addressed by the
9 parties in - - - in all their briefs.

10 JUDGE SMITH: In - - -

11 MS. HASAPIDIS: These - - - I mean, the
12 facts that I'm outlining for the court are not - - -
13 and you can take judicial notice of the orders of the
14 Workers' Compensation proceeding. These - - - these
15 facts were presented to the Supreme Court on a motion
16 to renew and so - - -

17 JUDGE SMITH: In Casas, not in your case?

18 MS. HASAPIDIS: In Casas; in Casas. But as
19 a result of this court's ruling, the 2008
20 determination is considered to be a determination
21 that he is no longer injured, by any means, such that
22 he is now precluded. And so if his case - - - if and
23 when his case goes to trial, he's going to - - - he
24 may be forced to use his pain and suffering award to
25 pay his Workers' Compensation lien, and then if - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 MS. HASAPIDIS: Thank you.

3 CHIEF JUDGE LIPPMAN: Thanks, counsel.

4 Rebuttal?

5 MR. MONTES: Here are my two difficulties
6 with some of the arguments that were just raised, and
7 this is response to Judge Rivera's question. When
8 Ms. Hasapidis was talking about continually having to
9 come back, she then qualified by saying, but that
10 would be in the case of a permanent partial
11 disability. That's correct.

12 In the case of a permanent partial
13 disability, there's an affirmative obligation on the
14 claimant to keep coming back to the board, saying, I
15 am making every effort to work, and here's the
16 ability - - - here's my limited ability to work. But
17 when you're claiming a permanent total disability,
18 which is what Mr. Verdugo claimed, you're saying, I'm
19 unable to work in any capacity, and I need lifetime
20 medical care.

21 When the board decides to terminate your
22 benefits, they're finding you are not permanently
23 totally disabled. And that's where she - - - they
24 keep missing a key ingredient of the board's
25 decision.

1 JUDGE PIGOTT: What - - - what then happens
2 - - - suppose that's true but he's permanently
3 partially disabled, are you saying that they're
4 foreclosed from even that?

5 MR. MONTES: I'm saying in that case, then
6 - - - and that's where I think some of the
7 misunderstanding has been - - - that might be a very
8 different case, Your Honor.

9 JUDGE PIGOTT: Well, no, I - - - I'm saying
10 exactly this case. In other words, this - - - the W
11 - - - the Workers' Compensation said you're not
12 permanently totally disabled. I get it.

13 MR. MONTES: Right.

14 JUDGE PIGOTT: But I am permanently
15 partially disabled, and I intend to prove that to the
16 Supreme Court in the State of New York in my
17 negligence case. Can they do it?

18 MR. MONTES: If the Workers' Compensation
19 Law judge says I'm going to classify you - - - I'm
20 going to continue your benefits and I'm going to
21 classify you as permanently partially disabled, well,
22 then they're still getting wage benefits and they're
23 still getting medical benefits. So we wouldn't have
24 the argument that you're precluded from it, because
25 you're still getting it.

1 JUDGE PIGOTT: But totally dependent on the
2 lien, isn't it? If there's no lien, there's no cause
3 of action, you're saying.

4 MR. MONTES: Well, I - - - I think word - -
5 - I - - - I struggle with the word "lien", but I
6 think really what we're talking about is the finding
7 of whether or not you're entitled to the benefits,
8 and the benefits would be wage, replacement, and
9 medicals. And we can't lose sight of the fact that
10 the board determination was both. Which goes to show
11 - - - which proves that we're not talking about just
12 the ability to work, we're talking about the ability
13 to work and the need for future medical care, because
14 - - -

15 JUDGE SMITH: I'm - - - I'm a little
16 confused about the medical.

17 MR. MONTES: Right.

18 JUDGE SMITH: The - - - the board finds
19 that the guy is no longer able to work. Then in the
20 - - - I'm sorry; the board finds that he is able to
21 work. That doesn't mean he's never going to need a
22 doctor again.

23 MR. MONTES: That's right, and so - - -

24 JUDGE SMITH: What - - - what - - - where
25 is the inconsistency between awarding future medical

1 and the board ruling?

2 MR. MONTES: In this particular case, or in
3 a hypothetical you're - - -

4 JUDGE SMITH: Oh, give me - - - give me - -
5 - do either one.

6 MR. MONTES: Okay, because in this part - -
7 - in this particular case, it would be inconsistent,
8 as you say, that the - - - for the board to say, he
9 has no further need for medical treatment, because in
10 order to reach that, you have to find he's not
11 injured anymore. That his injuries have resolved.
12 If his injuries have resolved, then he has no claim.
13 The same jury up in Vermont that we talked - - -

14 JUDGE SMITH: Well, has the - - - has the
15 board in this case found that he has no future need
16 of medical treatment or did they just found that he -
17 - -

18 MR. MONTES: Yes.

19 JUDGE SMITH: - - - they just found they're
20 not giving him any today, but let's see about
21 tomorrow?

22 MR. MONTES: Yes, because if you go to page
23 130 of the record, which is why this court issued it
24 as to to both, they say, "With respect to claimant's
25 other established injuries, the board panel agrees

1 that Zaretsky provided the more credible opinion that
2 the claimant had no further disability after January
3 2006, and no further need for treatment." It found
4 both.

5 So if he was permanently totally disabled,
6 you would have to find he's got to go to the doctor.
7 If he has PTSD, he's got to go to the doctor.

8 JUDGE SMITH: But the board - - - the board
9 finding doesn't mean for the rest of his life, does
10 it?

11 MR. MONTES: If he's permanently totally
12 disabled, absolutely.

13 JUDGE SMITH: No, no, the board says, no
14 further need for treatment. Does that - - - is that
15 implicitly a finding that he will never have any
16 medical stemming from this accident for the rest of
17 his life?

18 MR. MONTES: That's a reject - - - that's a
19 - - - that's a rejection of the underlying claim that
20 he's injuries haven't re - - - that his injuries
21 haven't resolved.

22 JUDGE PIGOTT: Isn't it - - - isn't it
23 generally the case that all we're talking about is
24 what the size of the lien is going to be in the - - -
25 in the plenary action? Because that's all that's

1 going to end up in this thing.

2 If - - - if they found totally against the
3 carrier - - - against the employer here - - - and
4 said, he's - - - continue to pay his medical, it
5 could go to 20, 30, 40, 50,000 dollars, and that
6 means he's going to collect it from you, because he's
7 going to have a lien on any award that's - - - that's
8 benefited. And that's all. That's all that ever
9 gets decided down there.

10 MR. MONTES: In front of the Workers'
11 Compensation board?

12 JUDGE PIGOTT: Yeah, is the - - - is the
13 amount of the lien.

14 MR. MONTES: Not necessarily, because what
15 if this was an action just between the individual and
16 his employer? I mean, this becomes his exclusive
17 remedy.

18 JUDGE PIGOTT: Can't sue you for it.
19 Right.

20 MR. MONTES: This is all he has.

21 JUDGE PIGOTT: Can't sue you for it, so
22 you're stuck.

23 MR. MONTES: Right. So - - - and this is -
24 - -

25 JUDGE PIGOTT: And - - - it's like no fault

1 there though, except no fault's not a - - -

2 MR. MONTES: Right.

3 JUDGE PIGOTT: - - - isn't a lien.

4 MR. MONTES: Right, but what they would be
5 deciding is that - - -

6 JUDGE PIGOTT: No fault's collateral. But
7 - - - but in a lien situation here, the - - - the
8 whole point of the Workers' Comp was you give up your
9 right for all of that in return for, regardless of
10 fault, regardless of - - - you know, you're going to
11 get your wages, and you're going to get your medical.

12 MR. MONTES: I think - - -

13 JUDGE PIGOTT: That's not the case with
14 respect to you, because you're the tortfeasor, the
15 alleged tortfeasor in the plenary action. And it
16 seems like you want the same benefit that the
17 employer gets to be used in your plenary action.

18 MR. MONTES: All we're looking for is the
19 way the collateral estoppel has been applied - - -

20 JUDGE PIGOTT: Right.

21 MR. MONTES: - - - which is that if you
22 decide a fact, if you litigate an issue, am I
23 recovered from my injuries or am I permanently
24 totally disabled? And if an - - - if an - - - if an
25 individual - - - a judge, a fact finder, finds that

1 you've recovered, then you shouldn't be able to go to
2 another proceeding, another forum, and now claim that
3 you haven't recovered.

4 JUDGE PIGOTT: Much like the finding
5 against you, with respect to the - - - the building
6 violations, right? I mean, you can't go back and
7 relitigate that and they're going to use that, I
8 assume, in the plenary action.

9 MR. MONTES: That's right, and what's
10 interesting about that, Your Honor, is that you look
11 at page 255, this whole notion of - - - you know, I
12 remember the last time we ar - - - had the oral
13 arguments, we talked about looking over the horizon;
14 do you anticipate that this might be a result?

15 They argued that directly against us,
16 saying, because you knew the action is pending, you
17 knew of the possibility. You knew or should have
18 known that it could have been collateral estoppel as
19 to you in the future - - - in the next proceeding.
20 And the same could be said against - - - the same - -
21 - the same should be said for them.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. MONTES: Thank you.

24 CHIEF JUDGE LIPPMAN: Thank you both.

25 Appreciate it.

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MS. HASAPIDIS: Your Honor, there was - - -

CHIEF JUDGE LIPPMAN: No, no. Thank you

both.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Auqui v. Seven Thirty One Limited Partnership, No. 212 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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