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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. _____ PART 35

HON. CAROL EDMEAD Justice

Jose Verdugo and Maria Verdugo

INDEX NO. 100232/2004

-v-

Seven Thirty One Limited Partnership, Bovis Lend LMB Inc, and North Side Structures Inc.,

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	_____
Answering Affidavits - Exhibits	_____
Replying Affidavits	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion for an order estopping the plaintiffs Jose Verdugo and Maria Verdugo from relitigating the issue of a causally-related disability beyond January 24, 2006, is granted; and it is further

ORDERED that the branch of defendants' motion for an order precluding plaintiffs' expert, Scott M. Silberman, PE from testifying at trial or, in the alternative, precluding the plaintiffs and Mr. Silberman from testifying or offering any evidence as to alleged violations of the Building Code and American Concrete Institute Standard, is denied; and it is further

ORDERED that plaintiffs' cross-motion to amend the Bill of Particulars to include certain additional NYC Building Code sections and industry standards violated by the defendants, is granted, and the Proposed Amended Bills of Particulars submitted in support of their cross-motion is deemed served, *nunc pro tunc*; and it is further; and it is further

ORDERED that plaintiffs serve a copy of this order within five days.

This constitutes the decision and order of the Court.

Dated 10/2/09

ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JOSE VERDUGO and MARIA VERDUGO,

Plaintiffs,

-against-

SEVEN THIRTY ONE LIMITED PARTNERSHIP, BOVIS LEND LMB INC. and NORTH SIDE STRUCTURES INC.,

Defendants.

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Index No. 100232/2004

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Seven Thirty One Limited Partnership, Bovis Lend LMB Inc. and North Side Structures Inc. ("defendants") move for an order (1) estopping the plaintiffs Jose Verdugo ("plaintiff") and Maria Verdugo ("plaintiffs") from relitigating the issue of a causally-related disability beyond January 24, 2006 as the issue was previously litigated and determined with finality in an Administrative (Workers' Compensation) forum and (2) precluding plaintiffs' expert, Scott M. Silberman, PE ("Mr. Silberman") from testifying at trial or, in the alternative, precluding the plaintiffs and Mr. Silberman from testifying or offering any evidence as to alleged violations of the Building Code and American Concrete Institute Standard.

Plaintiffs cross move to amend the Bill of Particulars and to deem the Proposed Amended Bills of Particulars served upon defendants *nunc pro tunc*.

Factual Background

It is alleged on December 24, 2003, plaintiff, during the course of his employment, was struck by a sheet of plywood which fell from a building under construction at 731 Lexington

Avenue, New York, New York. Defendant Seven Thirty One Limited Partnership was the owner of the premises/project, defendant Bovis Lend Lease LMB, Inc. was the construction manager and defendant Northside Structure, Inc. was the concrete super structure subcontractor.

After a full hearing on June 30, 2006, a Workers' Compensation Law Judge (the "WCLJ") found that, as of January 24, 2006, plaintiff did not have any further disability which was causally-related to the alleged accident (the "Reserved Decision"). The WCLJ precluded the testimony of the employer's psychiatrist, Dr. Martin Doft, and considered the testimony of the insurer's examining orthopedist, Dr. Robert Zaretsky, and plaintiff's treating neurologist, Dr. Jean Francois, and psychiatrist, Dr. Daniel Kuhn. Plaintiff appealed the WCLJ's decision and on February 1, 2007, the Workers' Compensation Board Panel (the "Board") affirmed the decision.

The trial of this action is now scheduled for November 30, 2009.[1]

Defendants' Motion

Defendants argue that plaintiffs are estopped from relitigating the issue of ongoing head, neck, back and psychiatric injuries resulting from the accident beyond January 24, 2006 as they were afforded a full and fair opportunity to litigate this issue. Defendants assert that the determination that there was no ongoing casually-related disability after January 24, 2006, which was made first by a WCLJ and later affirmed by the Board, qualifies as the type of prior determination which should be given preclusive effect.

The issue of whether the plaintiff had an on-going causally-related disability in the

[1] According to defendants, this action was marked final for trial on September 10, 2008. However, two days earlier, plaintiffs moved to amend their bill of particulars to assert that the plaintiff was struck by glass rather than plywood. The Court denied the motion, and scheduled the trial (final) on March 16, 2009. On that date, plaintiffs' counsel advised the Court that he would not go forward because he was closing his practice and transferring his files to another firm. The Court adjourned the trial to May 22, 2009. On that date, the trial was again adjourned as a result of a then, pending substitution of counsel.

Workers' Compensation forum is identical to the issue of whether plaintiff has an ongoing causually-related disability in his present claim for future economic and non-economic damages.

Additionally, plaintiffs were represented by counsel and produced sworn testimony of their treating doctors, Dr. Kuhn and Dr. Francois, the same doctors they intend to call at trial. Plaintiffs' lawyer had an opportunity to cross-examine the employer's doctors, Dr. Zaretsky and Dr. Doft, and did so at their depositions. Despite having the benefit of their own expert psychiatrist's testimony and the advantage of having precluded the testimony of the employer's expert psychiatrist, plaintiff still failed to establish a claim for an ongoing causally-related disability. Having participated in a trial-like hearing where plaintiff introduced affirmative evidence, challenged opposing evidence, and took advantage of the appeal process, plaintiffs had a full and fair opportunity to litigate the issue of ongoing causally-related disability.

Defendants also argue that upon plaintiffs' request, the Court previously estopped defendant Bovis from denying that they violated NYC Adm. Law §§ 27-1009(a) and 27-1018. Plaintiffs argued that "the ALJ's findings that the plywood was not nailed down sufficiently ... necessarily defeats Bovis' [sic] claim of no responsibility and establishes Plaintiffs' cause of action because the failure to adequately safeguard is an "essential predicate" to the negligence claimed. The first prerequisite of collateral estoppel identity of issue - is therefore established." Bovis argued that the type of proceeding in which the administrative violations were determined, the manner in which that litigation was conducted, the slight differences in the identity of the issue and the difference in the law mandated that Bovis be permitted to re-litigate the issue at trial; and, that in be administrative forum, there was no trial by jury, no opportunity to present witnesses and a different standard of law. In reply, plaintiffs argued that Bovis was aware of the

ECB proceeding, and that the absence of a jury did not affect the applicability of the administrative decision. The factors that formed the basis for the Court's grant of plaintiffs' application against Bovis are identical to those forming the basis of defendants' request against the plaintiffs herein.

In support of precluding Mr. Silberman's testimony as to violations of the Code and industry standards, defendants argue that plaintiffs failed to comply with CPLR 3101(d). The plaintiffs waited until less than three weeks before trial to disclose this expert even though the Note of Issue was filed on January 7, 2008, over two years prior. There is no "good cause" why this expert has not been disclosed until now. Absent preclusion of Mr. Silberman, defendants will be prejudiced, as Mr. Silberman would be expected to testify about Code provisions and industry standards never previously disclosed in this case. With respect to "eve of trial" expert witness disclosures by a plaintiff, such as the plaintiffs in this case, the First Department has consistently found preclusion to be appropriate.

Further, plaintiffs should be precluded from introducing any testimony or other evidence of Code sections and industry standards not previously disclosed. The only Code provisions in the bill of particulars that plaintiffs mentioned were 1 RCNY § 26-03, 1 RCNY § 26-04, NYC Adm. Law §§ 27-1009 and 27-1018. The expert exchange of Mr. Silberman served on February 24, 2009, however, also refers to Building Code §§ 27-1035(a)(1), 27-1035(c)(3), 27-1035(c)(4) and 27-1018(a), American Concrete Institute Standard 347 ("ACI 347") and ANSI/SEI/ASCI-7 (American Society of Civil Engineers' Minimum Design Loads for Buildings and Other Structures). Plaintiffs did not seek leave to amend the Bill of Particulars to assert these provisions. Thus, the expert, if allowed to testify, should be precluded from testifying as to the

recently asserted violations, introduced after the completion of discovery; otherwise, defendants would be severely prejudiced.

Plaintiffs' Cross-Motion and Opposition

In opposing the application of collateral estoppel, plaintiffs argue that there is no case in which a plaintiff was held estopped from arguing future damages to a jury in a tort case based on an adverse administrative Workers' Compensation hearing. Instead, collateral estoppel in tort cases are limited to findings such as whether the injury occurred "within the scope of employment," the applicability of the Workers' Compensation Exclusivity provision, and other limited factual findings.

Further, the evidentiary burdens are different, whereas Workers' Compensation Board determinations as to "causally related" injuries are upheld if supported by "substantial evidence" and the standard in a tort action as to future damages turns on "a preponderance of the evidence." In a Workers' Compensation hearing, the medical testimony from treating physicians is limited in scope and done through depositions, and the claimant's attorney does not have the opportunity, or the financial incentive, to bring in experts to opine on complex issues relating to medical causation, and permanency. The brief nature of an administrative hearing cannot compare with a full blown damages trial. The damages portion of the trial herein will last approximately four weeks given the number of medical, engineering, and vocational experts who will be called.

Additionally, new evidence exists that would have altered the Workers' Compensation determination, and thus, the prior outcome precludes the application of collateral estoppel, as it intimates that the plaintiffs were not afforded a "full and fair opportunity" to litigate the issue of ongoing casually-related disability. Subsequent to the Workers' Compensation determination,

there was "new evidence," *i.e.*, a "Brain MRI w/DTI" sequencing and neuropsychological testing, that would have supported plaintiffs' claim of "total permanent disability" and altered the prior Workers' Compensation determination.[2]

Moreover, argues plaintiffs, in order to be binding and conclusive on a court, a prior determination must be final, and here, plaintiff has re-opened his Workers' Compensation claim as to "ongoing causally-related disability." This precludes the application of collateral estoppel.

Plaintiffs also argue, the Court should deny defendants' application to preclude plaintiffs from introducing Mr. Silberman's testimony, and permit plaintiffs to amend the Bill of Particulars for good cause shown and lack of prejudice. The need for Dr. Silberman arose after this Court issued a decision in which it found an issue of fact due to the affidavit of Mr. Wright, and permitted defendants to invoke the defense of "Act of God." Plaintiffs' expert exchange clearly establishes that their expert's testimony was to be introduced to rebut the defendants' expert, George Wright ("Mr. Wright").[3] Further, defendants cannot claim prejudice because: (a) plaintiffs are calling him as a rebuttal witness; (b) defendants have exchanged their own expert

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[2] Plaintiffs aver that the cross-examination of plaintiff's psychiatrist Dr. Kuhn, revealed that a neuropsychological test in Spanish was needed to support his medical conclusions. Such testing in Spanish was performed the week after by neuropsychologist Marcela A. Bonafina-Caraccioli, Ph.D., and was not part of the medical records evaluated by the Workers' Compensation Board. It is alleged that neuropsychological evaluation confirms that plaintiff suffered traumatic brain injury ("TBI") as result of the accident. Subsequent to the testimony of Dr. Francois, plaintiff's treating neurologist, plaintiff had an MRI of the Brain (May 16, 2006) that revealed "a remote hemorrhage at the right frontal convexity with white matter loss of ultrastruclural integrity", which is consistent with TBI. These results were not part of the record before the Workers' Compensation Board. On cross-examination, Dr. Francois was forced to concede that all test results were normal, that his medical opinion was primarily based on subjective complaints, and that he could not give an opinion as whether plaintiff was a malingerer. Such positive Brain MRI with a clinical indication of TBI, conducted in 2006, analyzed together with the original objective testing done after the accident (in December 2003), would have reinforced his opinion that plaintiff was still "permanently disabled."

[3] Plaintiffs' expert exchange provides: "[Dr. Silberman] is expected to discuss and analyze the Building code and ANSI/SE1/ASCE 7, which address the increase in wind pressure due to height which would tend to rebut Mr. Wright's opinion about the wind speed expected at the 52nd Floor of the construction site."

engineer, Steven C. Batterman, Ph.D., who was retained on March 12, 2009, who will incorporate Mr. Wright's findings as to the scientific aspects of the accident, and offer testimony as to the scientific, technical and engineering aspects of liability, and (c) defendants will have ample opportunity to prepare for the plaintiffs' expert, as more than 36 weeks will have transpired between the expert exchange of Mr. Silverman and jury selection on November 30, 2009. Further, noncompliance with CPLR 3101(d)(l)(i) does not bar the Mr. Silberman's testimony as there is good cause, no evidence of intentional nondisclosure, and no prejudice is shown to defendants.

And, the Court, pursuant to CPLR § 3025(b), in its discretion, may freely grant plaintiffs' cross-motion to include the additional Code violations and industry standards absent prejudice to the defendants, especially, when plaintiffs reserved their right to supplement said rules, regulations, and statues in prior Bills of Particulars. The cases cited by defendants are "eve of trial" cases where the expert disclosure occurs three or less weeks before trial, which is clearly not the case here.

Reply

Plaintiffs confirm the fact that Workers' Compensation Board determinations have been found to have preclusive effect, and there is no case law indicating that preclusive effect of a Workers' Compensation Board determination is limited to certain issues. Plaintiff also had a full and fair opportunity to present the issues to the Workers' Compensation Board. Defendants add that plaintiffs were represented by counsel and produced sworn testimony of their treating doctors, Dr. Kuhn and Dr. Francois. Plaintiffs' lawyer had an opportunity to cross-examine the employer's doctors, Dr. Zaretsky and Dr. Doft at their depositions.

Further, any difference in the burden of proof before the Workers' Compensation Board and the burden of proof in the Supreme Court action is not relevant. In fact, the plaintiffs had a lower burden in the underlying Workers' Compensation case than in a Supreme Court action. Consequently, it should have been easier for plaintiffs to prevail before the Workers' Compensation Board.

Plaintiffs' argument that their Workers' Compensation attorney did not have the opportunity nor the financial incentive to bring in experts to opine on complex issues relating to medical causation and permanency lacks merit, since plaintiffs intend to call the exact experts who were called in the Workers' Compensation hearing as his experts at trial. Plaintiffs' attorney was aware that the Workers' Compensation proceeding could result in the plaintiff's compensation benefits being terminated; thus, counsel was fully aware of the consequences of the hearing. Plaintiffs counsel's reference to a potential four-week trial in Supreme Court is misleading in that he combines the liability and damages experts.

Plaintiffs' argument regarding the "new evidence" is specious. The incident occurred December 24, 2003 and the Board hearing was held in 2006, three years later. Plaintiffs fail to mention that there was a December 27, 2003 MRI of the brain performed without contrast at New York Presbyterian Hospital Department of Radiology. The impression of that film was "findings consistent with shear injury involving the right posterior frontal lobe and the left temporal lobe as described above." Although plaintiffs argue that this film shows evidence of a TBI, subsequent tests were all normal as explained by Dr. Francois. Clearly, such film was available to plaintiff and his treating physicians at the time of the Board hearing. Also, there is no indication on the May 2006 film of an injury that had not previously been considered. In fact,

the diagnosis of the TBI was testified to by Dr. Francois and Dr. Kuhn and rejected. Plaintiffs also misrepresent the use of the term "clinical indication" on the May 2006 film report; this term reflects the reason the doctor referred the plaintiff for the film, and does not support a TBI diagnosis. Also, Dr. Bonafina-Caraccioli did not treat the plaintiff.

Finally, plaintiffs' attempt to re-open the Workers' Compensation file was made in an effort to subvert the defendant's motion for collateral estoppel, and is not supported by plaintiff's treating physicians Dr. Kuhn or Dr. Francois, or Dr. Bonafina-Caraccioli. It is apparently supported by an internist, Dr. Lev Aminov, who first saw the plaintiff on August 13, 2009. Dr. Aminov identified the pathology warranting the re-opening as "severe headaches, dizziness, unsteady gait, neck, and lower back pain." He believes that testing in the form of "EMG/NCV upper and lower extremities, MRI, C-spine and L-spine" is required. He makes no reference to any neuropsychological injuries or any traumatic brain injuries or tests to evaluate such injuries or treatment designed to remedy such injuries. Consequently, plaintiffs' attempt to re-open the Workers' Compensation Board claim has nothing to do with so-called "new evidence" substantiating plaintiffs' claim for TBI. In fact, Dr. Aminov does not mention TBI and therefore the Workers' Compensation case would not be re-opened for that purpose. More importantly, the filing of this form does not mean that the file will be re-opened. At this time, the Board's determination is final and there is no ongoing disability beyond January 24, 2006. Drs. Kuhn and Francois had access to sophisticated testing which was referenced during the course of the examinations. It is also important to note that Dr. Aminov has never previously been disclosed as a treating physician of the plaintiff and, in fact, based upon this form did not see the plaintiff until August 13, 2009, five and a half years after the occurrence. Further, plaintiff provides no

explanation as to why no attempts to re-open the Workers' Compensation file were made any time prior to the pendency of the instant motion.

Finally, plaintiffs should be precluded from amending their Bill of Particulars again. It is noted that Building Code violations were issued to Bovis following the subject occurrence. However, those violations did not pertain to code sections referenced by Mr. Silberman. Mr. Silberman makes reference to §§ 27-1035(a)(1), 27-1035(c)(3), and 27-1035(c)(4); yet defendants were never charged with violations of these provisions and the first mention of any application of these provisions or alleged violation of them came in Mr. Silberman's supplemental expert exchange dated February 24, 2009, long after the expiration of the discovery deadline and the deadline pursuant to which the plaintiff was to identify any statutes, laws, or rules allegedly violated. Clearly, if they were relevant, Bovis would have been charged with violations of these provisions of the Code.

Additionally, Mr. Silberman's report makes reference to alleged failures on the part of the defendants to construct the building in accordance with technical specifications in the contract documents. There are references made to a failure to comply with American Concrete Institute Standard 347 and ANSI/SEI/ASCE-7. However, Mr. Silberman has not inspected the premises and is not in a position to comment on these issues. Further, a contractor cannot be held liable for failing to adhere to standards imposed by itself. These standards do not rise to the level of law and are not the standards by which a jury should judge the conduct of a contractor.

And, there would be prejudice to the defendants. These code provisions were not alleged until the eve of the third scheduled final trial date. Clearly, such allegations should have been divulged during the course of six-years of discovery and prior to the service of the note of issue.

Discussion

Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer*, 6 Misc 3d 228, 782 NYS2d 610 [Sup Ct Albany County 2004]). "Issue preclusion is available to protect a defendant who was not a party to an earlier lawsuit from the relitigation of an issue considered alternatively in the prior trial only when it is clear that the prior determination squarely addressed and specifically decided the issue" (*O'Connor v G & R Packing Co.*, 53 NY2d 278 [1981]). It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*Id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*Id.*). The doctrine of collateral estoppel precludes a party from relitigating an issue which has been previously, actually and necessarily decided against him or her in a prior proceeding in which there was a full and fair opportunity to litigate the point (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455). The doctrine is applicable not only to court decisions, but to prior determinations made in administrative forums that are "quasi-judicial" in nature and governed by "procedures substantially similar to those used in a court of law" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 499; *see also Johnson v Penn Mutual Life Ins. Co.*, 184 AD2d 230, 231 [1st Dept], lv. app. den., 80 NY2d 757 [1992]). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and

decisiveness of the issue" (*Ryan* at 501; *Capital Tel. Co. v Pattersonville Tel. Co., Inc.*, 56 NY2d 11, 18; *Schwartz v Public Admin.*, 24 NY2d 65, 73 [1969]). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing (*Ryan* at 501; *Capital Tel.* at 18).

Contrary to plaintiffs' contention, there is no authority for the position that the doctrine of collateral estoppel in a tort case, based on a Workers' Compensation Board determination, relates *only* to findings such as "scope of employment" and other limited factual findings. What is dispositive is whether the two-prong test articulated above (identicality and decisiveness of the issues, and full and fair opportunity to be heard), is met.

Identity of the Issues

Under this prong, the "issue must have been material to the first action or proceeding and essential to the decision rendered therein" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 478 NYS2d 823 [1984] citing *Silberstein v Silberstein*, 218 NY 525, 528). At the workers' compensation hearing, the issue was whether plaintiff's injuries to his head, neck, and back, and his post traumatic stress and depression, is a "further causally related disability since January 24, 2006." (Reserved Decision, p. 1).

As defendants point out, as to plaintiff's claims of orthopedic/neurological disability, the WCLJ noted that the carrier's examining orthopedist, Dr. Zaretsky, found that the plaintiff's MRI was normal; that his examinations of the plaintiff's neck and back were normal; that he did not detect any spasms; that range of motion was normal; and that he could not understand why the plaintiff used a cane as there was "no weakness, atrophy or spasms." Plaintiff s treating neurologist, Dr. Francois, testified that the CT scans of the head, cervical spine and lumbar spine

were normal; that he did not know who prescribed the cane; that on examination, he elicited cervical and lumbar spasms and limited range of motion; and that the straight leg raise testing was negative. Yet, according to Dr. Francois, plaintiff had a permanent, mild partial disability although the doctor discharged the plaintiff to pain management. As to plaintiff's alleged psychiatric disability, the WCLJ noted that Dr. Kuhn testified that plaintiff had post-traumatic stress disorder "as he fears construction sites although much construction occurs in the area of [Dr. Kuhn's] office"; plaintiff was somewhat coherent and sleepwalked; and that he did not know whether the plaintiff used a cane while sleepwalking. According to Dr. Kuhn, plaintiff "total disability exists." The WCLJ found that Dr. Zaretsky was "more credible" than Dr. Francois based upon the MRI and the claimant's use of the cane, and reasoned that if plaintiff was truly disabled, he could not sleepwalk without a cane. The WCLJ also rejected Dr. Kuhn's testimony of post-traumatic stress disorder, as incredible. Upon consideration of the testimony of the same doctors plaintiffs intend to call at trial, Drs. Kuhn and Francois, the WCLJ expressly found "no further causally related disability since January 24, 2006." (*Id.* p. 2).

On appeal, the Board held that the WCLJ was "not required to accept Dr. Kuhn's testimony as credible merely because it is uncontroverted on the issue of further causally-related psychiatric disability. Instead, the Board Panel finds that, based on the rationale set forth in the Reserved Decision, the [WCLJ's] credibility determination and findings are fully supported by the record. The Board Panel agrees that Dr. Kuhn's medical opinion is not credible with respect to the claimant's other established injuries. The Board Panel agrees that Dr. Zaretsky provided the more credible opinion and that the claimant had no further disability after January 4, 2006 and no need for further treatment."

Here, plaintiffs allege that plaintiff has an ongoing physical and psychiatric disability from the date of the accident to the present and future, and plaintiff intends to call Drs. Kuhn and Francois, the same physicians who testified at the workers' compensation hearing. The issue of plaintiffs' physical and psychiatric disability from the period from January 24, 2006 inclusive of this action is the same exact issue that was before the WCLJ and the Board.

Therefore, the criterion of issue identicality and decisiveness of the Workers' Compensation determination on the issue of plaintiffs' on going physical and psychiatric disability after January 24, 2006 is clearly established.

Full and Fair Opportunity to be Heard

With regard to the second prong of the estoppel doctrine, some of the factors to be considered concern the nature of the forum and the importance of the claim in the prior litigation, the incentive to litigate, the competence of counsel and the availability of new evidence that would have altered the prior outcome (*Ryan v New York Tel Co.*, 62 NY2d 494, 501 [1984]).

At the Workers' Compensation Board hearing in this matter, the plaintiffs were represented by counsel and were afforded the opportunity to, and introduced evidence in support of plaintiff's claim of ongoing disability. Plaintiffs offered the testimony and records of Dr. Kuhn and Dr. Francois and cross-examined Dr. Doft and Dr. Zaretsky who testified against plaintiff and his doctors.

Although, as plaintiffs point out, a Workers' Compensation decision is upheld upon a "substantial evidence" standard, the standard utilized by the Workers' Compensation Board, and the fact finder in a tort action alike, is the preponderance of the evidence standard (*Bonner v Brownell Steel, Inc.*, 57 AD3d 1329, 870 NYS2d 153 [3d Dept 2008] [stating that the Board

applied the proper standard of review in rendering its decision, 'weigh[ing] the evidence and ... [giving] effect to its preponderance'"]; *Matter of Ellingwood v Liberty Group Publ., Inc.*, 38 AD3d 1108, 1109, 833 NYS2d 274 [2007]; *Brown v Mobil Oil Co.*, 20 AD2d 833, 247 NYS2d 837 [3d Dept 1964] ["The board's function upon review is to weigh the evidence and to give effect to its preponderance whereas our judicial power upon appeal is limited to the application of the substantial evidence test to its findings"]; *see also Ellingwood v Liberty Group Pub., Inc.*, 38 AD3d 1108, 833 NYS2d 274 [3d Dept 2007] ["notwithstanding the Board's arguably misleading reference to the substantial evidence standard in its first two decisions, we are satisfied that, ultimately, the Board "weigh[ed] the evidence and ... [gave] effect to its preponderance"]). Therefore, the standard by which the evidence was measured in the Workers' Compensation forum is identical to that which would be applied in this action.

Balcerak v County of Nassau (94 NY2d 253, 701 NYS2d 700 [1999] and *Weiss v Franklin Square and Munson Fire Dist. of Town of Hempstead*, 309 NY 52 [1955]), cited by plaintiffs are inapplicable. In both cases, the standard under which disability benefits was granted under one administrative agency was markedly different from the standard to be utilized by the other administrative agency (*Balcerak* 258-261 [GML 207-c provides compensation for a correction officer "injured in the performance of his duties" due to the special work related to the nature of heightened risks and duties, whereas the more "general and comprehensive" Workers' Compensation Law provides all injured employees with some scheduled compensation regardless of fault; also, GML 207-c authorizes a municipality itself, not any other independent entity like the Workers' Compensation Board, to make the determination]; *Weiss* at 55 [GML 205 is a broader statute and not substantially identical with section 10 of the Workmen's Compensation

Law]). Again here, the standard under which the Workers' Compensation Board determined the issue before was the same standard that would be utilized by the fact finder herein.

The purported "new evidence" of TBI and plaintiffs' inability to return to work, in the form of neuropsychological testing and a Brain MRI, obtained after the depositions held in connection with the adverse Workers' Compensation determination, did not deprive plaintiff a "full and fair opportunity" to contest said determination. As to plaintiffs' claim that the testing by Dr. Bonafina-Caraccioli wsa not part of the medical records evaluated by the Board, it is noted that (1) plaintiff's accident occurred on December 24, 2003 and the Board hearing was held in 2006, three years later, and (2) on January 23, 2006, plaintiffs were given until May 24, 2006 to submit deposition transcripts and memoranda of law for further adjudication. Thus, plaintiffs were given ample opportunity to obtain and present information to the WCLJ. It is further noted that plaintiff's claims pertaining to TBI were already before the Board through the testimony of Drs. Francois and Kuhn and that Dr. Bonafina-Caraccioli was not plaintiff's treating physician, in any event.

Further, that the plaintiffs have applied to re-open the Workers' Compensation file, based not on his treating physicians (Drs. Kuhn and Francois) and not on Dr. Bonafina-Caraccioli, but upon the finding of Dr. Lev Aminov, does not preclude the preclusive effect of the final Workers' Compensation determination upon this action. The Workers' Compensation filing does not guaranty that plaintiff's file will be re-opened.

Therefore, having had a full and fair opportunity to address the issue of ongoing causally-related disability beyond January 24, 2006, plaintiff is collaterally estopped from relitigating the issue of any ongoing head, neck, back and psychiatric injuries resulting from the accident beyond

January 24, 2006, and this branch of defendants' motion is granted.

Preclusion of Dr. Silberman's Expert Testimony

CPLR 3101 (d)(1)(i) requires disclosure of expert information within a "sufficient period of time before the commencement of trial to give appropriate notice thereof" (*Strachman v The Palestinian Auth.*, 2008 WL 2090466 [Supreme Court, New York County 2008]). However, CPLR 3101(d)(1) continues to state that

> where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

Thus, preclusion of expert reports on the ground of failure to comply with the rules governing exchange of reports is generally unwarranted, absent a showing that the noncompliance was willful or the party seeking preclusion was prejudiced by the lateness of the exchange (*Nathel v Nathel*, 55 AD3d 434, 866 NYS2d 153 [1st Dept 2008]).

There is no indication that plaintiffs' noncompliance was intentional or willful. Instead, plaintiffs indicate that the Court's decision on September 3, 2008 gave rise to their need to address those statements by defendants' expert, meteorologist Mr. Wright, that affected the Court's decision. Further, the trial is scheduled for November 30, 2009, and plaintiffs served their expert disclosure of Dr. Silberman on February 2009. Although plaintiffs' expert exchange of Mr. Silberman occurred five months after the Court's decision, defendant had five months to prepare to address Mr. Silberman's statements. Therefore, preclusion of plaintiffs' expert is unwarranted (*McDermott v Alvey, Inc.*, 198 AD2d 95, 603 NYS2d 162 [1st Dept 1993]

[plaintiff's expert economist, who was retained at least one month before the scheduled trial date, but not immediately disclosed to the opposing party because of an uncertainty concerning the witness's availability to testify at trial, was not precluded, where there is no proof of intentional or willful failure to disclose, on plaintiff's part, and an absence of prejudice to the parties opposing the testimony]). Therefore, the branch of defendants' motion seeking preclusion of Dr. Silberman's testimony, is denied.

Plaintiffs' Cross-Motion to Amend Bill of Particulars and Deem Same Timely Served

CPLR 3025 (b) provides that "[a] party may amend his pleading . . . at any time by leave of court" and that "[l]eave shall be freely given upon such terms as may be just." It is axiomatic that absent prejudice or surprise, such leave should be freely given CPLR 3025[b]), except where the proposed amendment plainly lacks merit and would serve no purpose than to needlessly complicate and/or delay discovery and trial (*Verizon New York, Inc. v Consolidated Edison, Inc.*, 38 AD3d 391, 830 NYS2d 902 [1st Dept 2007] citing *Berger v Water Commrs. of Town of Waterford*, 296 AD2d 649, 744 NYS2d 562 [2002]). Motions to amend the pleadings are also at the discretion of the court (*Edenwald Contracting Co. Inc. v City of New York*, 60 NY2d 957).

In *Orros v Yick Ming Yip Realty, Inc.* (258 AD2d 387, 685 NYS2d 676 [1st Dept 1999]), plaintiff moved for leave to amend his Bill of Particulars, nearly one year after the filing of his note of issue. On appeal, the First Department held that the because plaintiff raised a new theory of liability based upon the alleged negligence of a nonparty, it was properly denied. Plaintiff had notice of the facts pertinent to the proposed amendment for months prior to the filing of his note of issue and offered no explanation for his delay in moving to amend. However, the Court continued, "plaintiff should have been permitted to file a supplemental bill of particulars with

respect to defendants' alleged violations of statutes, ordinances, rules, and/or regulations, since these amendments, which merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars, raise no new theory of liability."

Here, the plaintiffs' Bill of Particulars included references to, *inter alia*, NYC Adm. Law §§ 27-1009 and 27-1018.

NYC Adm. Code § 27-1009(a) provides that a "contractor engaged in building work shall institute and maintain safety measures and provide all equipment or temporary construction necessary to safeguard all persons and property affected by such contractor's operations."

Section 27-1018, entitled "Housekeeping" provides that

> (a) All areas used by the public shall be maintained free from . . . debris, equipment, materials, projections, tools, or other item, substance, or condition that may constitute a slipping, tripping, or other hazard.
> (b) When not being used, materials, equipment, and tools that might fall from levels above areas used by the public shall be kept away from edges or openings. When exterior walls are not in place, material piles shall be kept at least ten feet back from the perimeter of the building.
> (c) Material may be stored within two feet of the edge of a building provided however that such material is stored not more than two stories below the stripping operation on concrete structures or the uppermost concrete floor on steel frame structures. Such material shall be secured against accidental movement. Storage of material on all other floors shall conform to paragraph (b) of this section and shall be secured when not being used.

The expert exchange of Mr. Silberman served on February 24, 2009 refers to, *inter alia* Building Code §§ 27-1035(a)(1), (c)(3), (c)(4), which and American Concrete Institute Standard 347 ("ACI 347") and ANSI/SEI/ASCI-7.

It is uncontested that Building Code § 27-1035(a)(1) states that "[f]ormwork, including all related braces, shoring, framing, and auxiliary construction shall be proportioned, erected, supported, braced, and maintained so that it will safely support all vertical and lateral loads that

might be applied until such loads can be supported by the permanent construction"; §27-1035 (c)(3) provides that "[b]races and shores shall be designed to resist all external loads such as wind, cable tensions, inclined supports, dumping of concrete, and starting and stopping equipment; §27-1035(c)(4) provides state that "formwork shall be designed for any special conditions of construction likely to occur, such as unsymmetrical placement of concrete, impact of machine-delivered concrete, uplift, and concentrated loads." The ACI 347 allegedly mirrors the Building Code, and ANSI/SEI/ASCI-7 imposes minimum design requirements for buildings.

These additional sections, like the provisions previously alleged in the Bill of Particulars, deal with securing materials, formwork, equipment, and the like from dislodging, and do not add any additional theories of liability, but are arguably based on the facts developed in the record.

Therefore, plaintiff's application to amend his Bill of Particulars to include the aforementioned provisions is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion for an order estopping the plaintiffs Jose Verdugo ("plaintiff") and Maria Verdugo ("plaintiffs") from relitigating the issue of a causally-related disability beyond January 24, 2006 as the issue was previously litigated and determined with finality in an Administrative (Workers' Compensation) forum, is granted; and it is further

ORDERED that the branch of defendants' motion for an order precluding plaintiffs' expert, Scott M. Silberman, PE ("Mr. Silberman") from testifying at trial or, in the alternative, precluding the plaintiffs and Mr. Silberman from testifying or offering any evidence as to alleged

ORDERED that plaintiffs' cross-motion to amend the Bill of Particulars to include certain additional NYC Building Code sections and industry standards violated by the defendants, is granted, and the Proposed Amended Bills of Particulars submitted in support of their cross-motion is deemed served, *nunc pro tunc*; and it is further

ORDERED that plaintiffs serve a copy of this order within five days.

This constitutes the decision and order of the Court.

Dated: October 2, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK