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

PRESENT: Edmead Justice PART 55

Verdugo

- v -

Seven Thirty One Limited Partnership et. al.

INDEX NO. 100232/04

MOTION DATE 12/4/09

MOTION SEQ. NO. 008

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, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' order to show cause for an order granting renewal and/or reargument of defendants' motion to collaterally estop plaintiffs from contending that plaintiff's injuries after January 26, 2006 were causally related to the accident, is granted; and it is further

ORDERED that upon renewal and reargument, the Court adheres to its previous determination; and it is further

ORDERED that plaintiffs' order to show cause for an order staying the trial pending an appeal from this Court's October 2, 2009 Order, is granted, as unopposed; and it is further

ORDERED that plaintiffs' order to show cause for an order staying the trial of this action pending review of the parties' appeals of this Court's September 2, 2008 Decision and Order, is granted, as unopposed; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 12/2/09

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MDAI

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

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JOSE VERDUGO and MARIA VERDUGO,

Index No. 100232/2004

Plaintiffs,

-against-

DECISION/ORDER

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

Defendants.

----------X

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

MEMORANDUM DECISION

Plaintiffs, Jose Verdugo ("plaintiff") and Maria Verdugo ("plaintiffs") commenced this personal injury action against defendants Seven Thirty One Limited Partnership ("Seven Thirty One") (the premises/project owner), Bovis Lend LMB, Inc. ("Bovis") (the construction manager) and North Side Structures, Inc. ("Northside") (the subcontractor) for injuries he sustained when he was struck in the head by a piece of plywood that dislodged from a building under construction at 731 Lexington Avenue, New York, New York.

Plaintiffs now move by order to show cause for an order (1) granting renewal and/or reargument of defendants' motion to collaterally estop plaintiffs from contending that plaintiff's injuries after January 26, 2006 were causally related to the accident, and upon renewal and/or reargument, denying defendants' motion, and if renewal is denied, (2) staying the trial pending an appeal from this Court's October 2, 2009 Order, and in all events (3) staying the trial of this action pending review of the parties' appeals of this Court's September 2, 2008 Decision and Order.

Procedural Background

In 2006, a Workers' Compensation Law Judge (the "WCLJ") held a full hearing on the issue of whether plaintiff's injuries to his head, neck, and back, and his post traumatic stress and depression, constituted a "further causally related disability since January 24, 2006."[1] In its Decision, the WCLJ noted that the carrier's examining orthopedist, Dr. Robert Zaretsky, found that (1) plaintiff's lumbar MRI was normal; (2) his examinations of the plaintiff's neck and back were normal; (3) he did not detect any spasms; (4) plaintiff's range of motion was normal; and (5) he could not understand why plaintiff used a cane as there was "no weakness, atrophy or spasms." Plaintiff s treating neurologist, Dr. Jean Francois, testified that the CT scans of plaintiff's 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 plaintiff to pain management. The WCLJ also noted that Dr. Daniel 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's "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

[1] 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.

not sleepwalk without a cane. The WCLJ expressed that, "it appears that the cane is merely a prop." The WCLJ also rejected Dr. Kuhn's testimony as incredible. Dr. Kuhn's admission that the area where his office is located and where plaintiff paid numerous visits is in the midst of a lot of construction contradicts his stated basis for diagnosing posttraumatic stress disorder. The WCLJ found "no further causally related disability since January 24, 2006." (WCLJ Decision, p. 2). On appeal, the Workers' Compensation Board Panel (the "Board") affirmed the Decision.

After the close of discovery in this action, defendants moved to collaterally estop plaintiffs from relitigating the issue of a causally-related disability beyond January 24, 2006. By order dated October 2, 2009, this Court granted defendants' motion, relying upon the WCLJ finding that, as of January 24, 2006, plaintiff did not have any further disability which was causally-related to the alleged accident.[2]

Plaintiffs' Motion For Renewal/Reargument

In support of renewal, plaintiffs contend that shortly after this Court granted defendants' motion, a court of concurrent jurisdiction (Schafer, J.) (the "sister court") appointed a guardian for plaintiff based on its determination that plaintiff's injuries from the accident rendered him incompetent today and in the future (the "guardianship order"). The guardianship order was based on the same medical witness's opinion as was rejected by the Board in 2006; Dr. Kuhn's medical reports and opinion (dated August 12, 2009) submitted to the sister court in August 2009

[2] Plaintiffs previously moved to, *inter alia*, collaterally estop Bovis from denying that it violated certain New York City Administrative Codes on the date of the accident and for summary judgment against Bovis on the issue of liability. By order dated September 2, 2008, this Court granted the branch of plaintiffs' motion estopping Bovis from denying that it violated said Administrative Codes, and denied plaintiffs' motion for summary judgment against defendant Bovis Lend Lease LMB, Inc. on the issue of liability. Plaintiffs filed an appeal of this Order, and defendants have cross-appealed from this same Order.

are identical to the reports and opinion he proffered to the Workers Compensation Board ("WCB") in 2006 - that plaintiff sustained permanent, severe traumatic brain damage as a result of the accident.[3] Therefore, this Court's determination, based on the Board's determination that plaintiff no longer suffered from any injuries as a result of the accident after January 26, 2006, directly conflicts with the sister court's decision that plaintiff needs a guardian. This Court has continuing jurisdiction to reconsider its prior determination and to modify same. Had the guardianship order been presented to this Court at the time of defendants' motion, this Court would have denied the motion because such order and the submissions in that proceeding raised questions of fact as to whether the WCB proceeding collaterally estopped plaintiffs from seeking damages after January 26, 2006.

Any contention by defendants that modification of this Court's order is not necessary to avoid inconsistent decisions because this Court's order was entered before the guardianship order would unjustly mandate the denial of a guardian for an incompetent party who must be represented. Further, any contention that Justice Schafer did not necessarily decide that plaintiff's condition was causally related to the accident would be incorrect, since the sole cause for plaintiff's incompetency was reflected in Dr. Kuhn's medical opinion, which was considered by Justice Schafer.

Plaintiffs also contend that they could not have sought a guardian at an earlier time. Plaintiffs cannot be faulted for failing to appoint a guardian as this delay was occasioned by what

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[3] It is asserted that in both opinions, Dr. Kuhn reported that plaintiff sustained these injuries from the accident, including but not limited to TBI/post concussion syndrome, depressive disorder secondary to TBI, and post-traumatic stress disorder. Dr. Kuhn opined that plaintiff is brain damaged and is deeply impaired in his ability to remain focused, and retain information, and make sound decisions.

appears to be a conflict of interest that arose between plaintiffs and their former counsel, Robert Kruger ("Mr. Kruger"). In 2006, Mr. Kruger filed a guardianship petition, which was "strongly supported" by court evaluator, Lisa D'Urso. Yet, Mr. Kruger then requested that the guardianship matter be "marked off" the calendar to be later restored by letter, in order to permit Mr. Kruger "to determine with certainty the permanent deficits" of plaintiff; Mr. Kruger reported that he "has not . . . achieved a degree of reasonable certainty regarding the long term." Although he had a statutory duty to seek a guardian regardless of whether he was unsure whether the brain damage was permanent, Mr. Kruger never restored the matter, and instead, "arranged for" plaintiff to execute four agreements with Peachtree Pre-Settlement Funding to advance plaintiff $100,000 at 20% interest, of which plaintiff only received $31,000, with the remainder $68,500 going to Mr. Kruger to fund the disbursements of the case. Plaintiffs argue that the matter was never restored because the court evaluator would never have agreed to such an advancement to cover pre-trial expenses. Therefore, as the plaintiffs' omission stems from his incompetency, the grant of renewal is within the Court's discretion.

In support of reargument, plaintiffs argue that there is no identity of issues between the "causal relationship" element in the WCB proceeding and the "proximate cause" element in this action. The term proximate cause is nowhere defined by the Worker's Compensation Law and decisional authority; nor is the term "causally related" defined in tort law. The mere similarity in semantics between a Worker's Compensation Board proceeding and a negligence action does not suffice to establish an identity of issues. The WCB determination is not a finding of evidentiary fact, but a mixed issue of fact and law and was therefore based upon the public concerns of the WCB which are distinct from this Court's concerns in a personal injury action. While factual

issues which are necessarily decided in an administrative proceeding are given collateral estoppel effect, an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of fact and law, is not entitled to preclusive effect.

Further, the procedural differences between WCB and personal injury actions demonstrate a lack of identity of issues. The Board determination that plaintiff was not entitled to compensation after the date of the carrier's filing because his then-existing injuries were not "causally related" to the accident is not the equivalent of "proximate cause" in a negligence action. The notion that proximate cause in a negligence action can be decided based upon a filing date of an application to discontinue benefits has no basis in tort law.

And, a stay pending resolution of the parties' appeals is necessary because as indicated above, plaintiffs are more than likely to succeed on appeal. Further, defendants failed to raise an issue of fact on their Act of God defense, which this Court declined to dismiss. Moreover, defendants are liable for the work of the independent contractor.

A stay is necessary to avoid irreparable harm, in the form of exorbitant out-of-pocket expenses to plaintiffs in trying this action when pending appeals might result in a new trial. Plaintiffs live at poverty level, and the trial, consisting of at least 30 lay and expert witnesses traveling from other states, will comprise at least nine days. If plaintiffs' recovery is limited to plaintiff's injuries from the date of the accident, Christmas Eve in 2003 until January 23, 2006, then plaintiffs' potential recovery is reduced from more than $5 million to less than one million. If the case proceeds to trial in its current posture, the case will be worth less than the cost of the trial. There is also no prejudice since defendants also seek appellate review.

Defendants' Opposition

Defendants only oppose the portion of plaintiffs' motion which seeks renewal and reargument and, upon renewal and reargument, denial of the defendants' motion to collaterally estop plaintiffs from contending that the plaintiff's injuries after January 26, 2006 were causally related to the accident.

The appointment of a guardian does not provide a basis for renewal. Plaintiff originally sought the appointment of a guardian in 2006, over which Phyllis Gangel Jacob presided, and the proceeding resulted in Ms. D'Urso recommending the appointment of a guardian. Counsel for plaintiffs commenced a new proceeding for a guardian, which was the subject of an order to show cause filed on August 31, 2009, the same day plaintiff served opposition to the defendants' collateral estoppel motion. Despite the filing of an order to show cause related to the most recently commenced guardianship proceeding, and knowledge and possession of Ms. D'Urso's 2006 evaluation, no mention is made of either of these documents in plaintiffs' opposition to defendants' motion for collateral estoppel.

Further, plaintiffs' argument that the guardianship order is inconsistent with this Court's ruling on the collateral estoppel motion lacks merit, because at the guardianship proceeding, there were no records or opinions offered to counter the opinion of Dr. Kuhn; the proceeding was completely one-sided. Whether Justice Schafer's Decision implies that the plaintiff's condition is causally related to the accident is not relevant. Justice Schafer was not provided the opportunity to weigh the opinions of any other healthcare professionals who may consider the plaintiff to be competent or who may consider that any deficiencies exhibited by the plaintiff are not related to the subject occurrence. Consequently, Justice Schafer did not have before her a complete record

and an opportunity to fully and fairly evaluate the issue of causally related injury nor was she asked to do so. The Board evaluated testimony from plaintiff's doctors, Drs. Kuhn and Francois, and from the employer's experts. The Board was also able to evaluate the cross-examination of plaintiff's doctors by the employer's attorney. After having heard the opinions of these doctors and reviewing their testimony, the Board rejected the opinions of plaintiff's doctors.

And, plaintiffs could have sought the appointment of a guardian at an earlier time. First, the earlier petition for a guardian was initiated in May 2006, but subsequently marked off. Next, plaintiff's current counsel, who appeared in the action in June 2009 and obtained the file from predecessor counsel on or about July 2, 2009, could have sought the appointment of a guardian upon receipt of the file. Instead, counsel for plaintiff waited until August 31, 2009, the return date of the defendants' collateral estoppel motion to initiate that proceeding. No reasonable excuse has been offered for that delay.

Furthermore, the Board's determination of no ongoing disability is entitled to preclusive effect. At the Workers' Compensation Board hearing in this matter, the material issue was whether the plaintiff had an ongoing disability related to the occurrence. The plaintiff, was represented by counsel, presented medical evidence on his claims for disability based on physical injuries and his claim for disability based on psychiatric injury. Defendants argue that the cases cited by plaintiffs are distinguishable.

Discussion

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see Alpert v Wolf*, 194 Misc 2d 126, 133, 751 NYS2d 707 [New York City

Civ. Ct. 2002]; D. Siegel, New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987], lv. dismissed 71 NY2d 994, 529 NYS2d 277 [1988]). "A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence on the original motion" (*Boudreau v Broadway Houston Mack Dev., LLC,* 21 Misc 3d 1131, 873 NYS2d 509 [Sup Ct New York County 2008] citing *Leonard Fuchs, Inc. v Laser Processing Corp.*, 222 AD2d 280, 280, 635 NYS2d 224 [1st Dept 1995]). "[R]enewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" '(*Boudreau*, citing *Rubenstein v Goldman*, 225 AD2d 328, 328-329, 638 NYS2d 469 [1st Dept 1996], quoting *Beiny*, 132 AD2d at 210; *Chelsea Piers Mgmt. v Forest Elec. Corp.*, 281 AD2d 252, 252, 722 NYS2d 29 [1st Dept 2001]).

Plaintiffs' basis for renewal is based on one new fact: the October 13, 2009 guardianship order in which a court of concurrent jurisdiction found that plaintiff was incompetent. The guardianship order was not issued until after this Court's prior determination, and constitutes a new fact not offered on the prior motion that plaintiffs argue would have changed the court's prior determination. Consequently, plaintiffs' application for leave to renew is granted on this basis.

The guardianship order states that after a hearing, and "based on the clear and convincing evidence, the petition for guardian of person and property is granted." The guardianship order

names plaintiff's wife, Maria Verdugo, as plaintiff's personal guardian. The guardianship order, in and of itself, is insufficient to, as plaintiffs argue, raise an issue of fact as to whether plaintiff's injuries after January 26, 2006 were causally related to the accident. That plaintiff was found to be in need of a guardian does not indicate that his need for a guardian is due to injuries he sustained from the accident. Thus, plaintiffs' success on their motion depends upon the submissions upon which the guardianship order was based.

Although not indicated on the guardianship order, it appears from the record that the Court's determination was based on (1) the report of the Court Evaluator, dated October 13, 2009 and (2) Dr. Kuhn's report, dated August 12, 2009. The Court Evaluator's report states that plaintiff "can participate in the court hearing and communicate his wishes to the Court" and as was the case in 2006, plaintiff "has sustained brain damage as a result of his injuries and lacks the capacity to make decisions as to his medical and personal care and also lacks the capacity to settle and manage a lawsuit. . . ." Dr. Kuhn's report states that as a result of the accident, plaintiff suffers from, *inter alia*, TBI, with severe cognitive deficits, impaired concentration, impaired memory, and from severe depressive disorder secondary to TBI. Dr. Kuhn states that plaintiff is impaired in his ability to remain focused, retain information, concentrate and make sound decisions, and is in need of a guardian.

However, these same opinions were available to plaintiffs at the time defendants' collateral estoppel motion was submitted to the Court for consideration. Plaintiffs were aware of the 2009 opinions of Dr. Kuhn recently prepared in support of the guardianship proceeding and failed to bring these facts to the Court's attention in plaintiffs' opposition papers, or otherwise. The record fails to disclose any basis for plaintiffs' failure to alert the Court to Dr. Kuhn's recent

opinions concerning plaintiff's alleged disability. Likewise, plaintiffs were aware of Ms. D'Urso's June 6, 2006 report which was submitted in the first guardianship proceeding in support of the appointment of a guardian. Yet, despite plaintiffs' filing of an order to show cause on the guardianship proceeding on August 31, 2009, and knowledge and possession of Ms. D'Urso's 2006 evaluation, plaintiffs failed to mention either of these documents in plaintiffs' opposition to defendants' collateral estoppel motion. These facts, *i.e.*, the opinions of Dr. Kuhn and Ms. D'Urso were known and in the possession of plaintiffs, but yet, not submitted for the Court's review in determining the defendants' collateral estoppel motion, and plaintiffs failed to articulate any reason for their failure to submit these facts to Court.

Further, plaintiffs' argument that the guardianship order is inconsistent with this Court's ruling on the collateral estoppel motion is unpersuasive; other than Dr. Kuhn's report and the report of the Court Evaluator, no other records or opinions from the other doctors (which were before the Board and this Court) were offered in the 2009 guardianship proceeding. The Board considered the testimony of plaintiff's doctors, Drs. Kuhn and Francois, and of the employer's experts, as well as the cross-examination of plaintiff's doctors. Upon assessment of same, the Board rejected the opinions of plaintiff's doctors. Unlike the Board, Justice Schafer did not so evaluate the issue of causally related injury and the relevant competing testimony, as such issue was irrelevant in a guardianship proceeding. Since Justice Schafer did not weigh the opinions of any other doctors who may have considered plaintiff to be competent or who may consider that any deficiencies exhibited by the plaintiff are not related to the subject occurrence, it cannot be said that the guardianship order is inconsistent with this Court's prior order.

And, contrary to plaintiffs' contention, it cannot be said that their excuse for failing to

submit such facts on the prior motion stems from plaintiff's incompetency, as plaintiff could not seek a guardian due to the apparent conflict of interest between plaintiff and his former counsel. It is uncontested that plaintiff's current counsel appeared in this action in June 2009 and obtained the file from predecessor counsel on or about July 2, 2009. Thus, plaintiff's current counsel could have sought the appointment of a guardian upon receipt of the file in July 2009, and at least, brought it to the attention of the Court before the August 31, 2009 return date of defendants' collateral estoppel motion.

Therefore, upon renewal, the Court declines to deny defendants' motion based on the guardianship order, or the submissions upon which said order was based, and adheres to its earlier determination.

Turning to the branch of plaintiffs' motion for leave to reargue, leave to reargue under CPLR 2221 "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *William P. Pahl Equip. Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As plaintiffs argue that the Court misapprehended the caselaw which provides that there is no identity of issue between the "causal relationship" element in a WCB proceeding and the "proximate cause" element in this action, this Court grants plaintiffs' motion for leave to reargue. Upon reargument, the Court adheres to its earlier determination.

The doctrine of collateral estoppel has been found "applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies," including the Workers' Compensation Board (*Boudreau, supra*).

In *DeSimone v South African Marine Corp., S.A.* (82 AD2d 820, 439 NYS2d 436 [2d Dept 1981]), a case most analogous to the circumstances herein, the plaintiff suffered injuries on July 8, 1973 while working as a longshoreman loading defendant's ship. Plaintiff alleged that one of defendant's employees had negligently untied a cargo net fastened to the ship, causing it to become caught on the side of the vessel. Plaintiff alleged he had to strain in order to pull the net loose and, in so doing, sustained a heart attack. Consequently, plaintiff commenced a personal injury action against the shipowner. Plaintiff also filed a claim against his employer, International Terminal Operating Co., Inc., for disability compensation.

A hearing on plaintiff's compensation claim was conducted before an Administrative Law Judge of the United States Department of Labor (the "ALJ") where plaintiff and his employer, both represented by counsel, were given a full opportunity to present evidence, oral argument, and briefs concerning the issues relative to the compensation claim. After the hearing, the ALJ, "referring specifically" to the incident, concluded that the plaintiff "did not suffer an injury arising out of the [sic] and in the course of his employment. The credible evidence is that he suffered an attack of angina at work while sitting and at rest unrelated to his work and caused

by long standing arteriosclerosis." Thus, plaintiff's compensation claim was denied, and on appeal, the denial was affirmed by the Benefits Review Board of the Department of Labor.

In the personal injury action, defendant moved for summary judgment, arguing, *inter alia*, that (1) the Department of Labor's decision on plaintiff's compensation claim finally determined that no work-related activity on July 8, 1973 had caused plaintiff's heart attack; (2) plaintiff alleges the same injury in this suit as in the compensation proceeding and claims that work-related activity of July 8, 1973, in which defendant's negligence allegedly played a part, caused the injury; and (3) thus, since the factual issue of the cause of plaintiff's injury in this suit is identical with that already determined against him in the compensation proceeding, said prior determination will be binding and conclusive on this issue, and by reason of collateral estoppel, will preclude plaintiff from proving a necessary element of his personal injury action, *viz.*, the causal connection between defendant's alleged negligence and plaintiff's injury.

The Trial Court denied defendant's motion for summary judgment, and, in effect, rejected this collateral estoppel argument. On appeal, the Second Department, recognizing the applicability of the doctrine of collateral estoppel to the quasi-judicial determination of administrative agencies, held the following:

> On the record before us, there was an identity of issues and parties. The factual question of the work-related cause of plaintiff's injury had been fully and fairly litigated by plaintiff, as claimant, in the compensation proceeding, and finally determined against him upon *a finding that work-related activity had not caused his injury*. Therefore, *barred as the same party from relitigating the same issue, and bound by the unfavorable determination of the Department of Labor, plaintiff should have been precluded by collateral estoppel from proving the cause of injury alleged in the instant complaint, viz., his work-related activity as affected by defendant's allegedly negligent conduct*. As so precluded, plaintiff would have been rendered incapable of proving, *prima facie*, one of the necessary elements of his personal injury cause of action.
> (Emphasis added).

Likewise here, and as stated in this Court's prior determination, the criterion of issue identicality and decisiveness of the Workers' Compensation determination on the issue of plaintiffs' on going physical and psychiatric disability is clearly established. The issue of ongoing disability was key to the WCB proceeding and is key to the personal injury action herein. Further, at the WCB hearing, plaintiffs were represented by counsel and were afforded the opportunity to litigate, and introduced evidence in support of, plaintiff's claim of ongoing disability. Therefore, as indicated in the Court's earlier determination, the doctrine of collateral estoppel applies.

The cases cited by plaintiffs, including those from the Second Department, are distinguishable and thus, do not warrant a different result (*see e.g., Jenkins v Meredith & Assocs.*, 238 AD2d 477 [2d Dept 1997] [defendant failed to establish "that the plaintiff had a full and fair opportunity to litigate the issue that it was necessarily decided in the Workers' Compensation proceeding or, most importantly, that the Board determined that the plaintiff's meniscal tear was due exclusively to the 1992 accident and not the 1990 accident"]; *Baker v Muraski*, 61 AD3d 1373 [4th Dept 2009] [determining that definitions of the terms "employee," "employer" and "employed" in Labor Law and those of "employer" "employee" and "employment" and Workers' Compensation law were different and thus, the issues were not identical]; *Engel v Calgon Corp.*, 114 AD2d 108, 498 NYS2d 877 [3d Dept] [declining to apply collateral estoppel to a prior finding of the Unemployment Insurance Appeal Board as there were differing definitions of employee/employment under Labor Law 511(1)(a) for unemployment benefits and Human Rights Law governing discrimination]). Plaintiffs do not cite to any provision of the Workers' Compensation Law or to the common law that reflects that the Workers' Compensation Law

defines causation differently than the common law.

Therefore, upon reargument, the Court adheres to its earlier determination which granted defendants' collateral estoppel motion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' order to show cause for an order granting renewal and/or reargument of defendants' motion to collaterally estop plaintiffs from contending that plaintiff's injuries after January 26, 2006 were causally related to the accident, is granted; and it is further

ORDERED that upon renewal and reargument, the Court adheres to its previous determination; and it is further

ORDERED that plaintiffs' order to show cause for an order staying the trial pending an appeal from this Court's October 2, 2009 Order, is granted, as unopposed; and it is further

ORDERED that plaintiffs' order to show cause for an order staying the trial of this action pending review of the parties' appeals of this Court's September 2, 2008 Decision and Order, is granted, as unopposed; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 2, 2009

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