THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0114, Appeal of City of Nashua, the court on January 22, 2010, issued the following order:

The respondent, City of Nashua (City), appeals a decision of the New Hampshire Compensation Appeals Board (board) granting the motion for reconsideration filed by the petitioner, Paul Brennan (claimant), and requiring the City to pay for the claimant's medical treatment from January 12, 2006, onward, including the surgery proposed by one of his doctors. We affirm.

We will overturn the board's decision only for errors of law, or if we are satisfied by a clear preponderance of the evidence before us that the decision is unjust or unreasonable. Appeal of Dean Foods, 158 N.H. 467, 471 (2009). The board's factual findings are prima facie lawful and reasonable. RSA 541:13 (2007). "[O]ur task is not to determine whether we would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Dean Foods, 158 N.H. at 474 (quotation omitted). As the appealing party, the City bears the burden of proof. Id. at 471.

The City first argues that the board lacked jurisdiction to consider the claimant's claim that he suffered a cumulative trauma injury because this claim was not made to the hearing officer. We disagree. Although "[t]he board's de novo review of department of labor workers' compensation decisions is limited to issues raised in the department of labor proceedings," Appeal of Rainville, 143 N.H. 624, 629 (1999) (quotation omitted), the record here reveals that the cumulative trauma claim was, in fact, before the hearing officer.

In his decision, the hearing officer described the various neck and spine injuries the claimant has suffered during his long employment with the City, and observed that the claimant had submitted twenty-three first reports of injury, six concerning his neck. The hearing officer also noted that the claimant "denies ever[ ] being pain-free in his neck and cervical spine since his first date of injury in 1987." The hearing officer observed as well that while "the claimant admits to having pre-existing neck problems prior to January 23, 2006 [the date of the last injury], his cervical condition worsened significantly after that date." Moreover, at the hearing, in response to the City's assertion that the hearing officer had jurisdiction only to consider the January 23, 2006 date of injury, the claimant argued that there were "eight different dates of injury" that related to his request for pre-approval of the surgery, and that the claimant was not claiming January 23, 2006 as the only date of injury. "We made it clear to you," the claimant

argued to the hearing officer, "and have consistently throughout this case, that we were talking about a long course of conduct." Because we conclude that the claimant's cumulative trauma claim was before the hearing officer and, thus, properly before the board, we reject the City's contention that the board erred when it decided the claim.

The City next asserts that the doctrines of res judicata and collateral estoppel precluded the board from ruling upon the claimant's request for pre-approval of the surgery recommended by his doctor. The City argues that the hearing officer's March 2007 decision finally decided this issue on the merits.

Whether res judicata and/or collateral estoppel apply are questions of law that we review de novo. See Sleeper v. Hoban Family Partnership, 157 N.H. 530, 533 (2008). Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. Id. For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the administrative agency in both instances; and (3) a final judgment on the merits must have been rendered in the first action. See id.; see also Cook v. Sullivan, 149 N.H. 774, 777 (2003) (res judicata applies to administrative proceedings in which agency acts in judicial capacity, resolves disputed issues before it and which the parties had opportunity to litigate).

The doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in the prior action. Stewart v. Bader, 154 N.H. 75, 80 (2006). For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so. Id. at 80-81; see Farm Family Mut. Ins. Co. v. Peck, 143 N.H. 603, 605 (1999) (collateral estoppel may preclude relitigation of findings by an administrative board under certain circumstances).

We conclude that neither res judicata nor collateral estoppel applies to this case because, contrary to the City's assertions, the hearing officer did not issue a final judgment on the merits of the claimant's current request for pre-approval of the recommended surgery. The hearing officer rejected the claimant's initial request for pre-approval because the request failed to comply with New Hampshire Administrative Rules, Lab 507.05. Specifically, the hearing officer determined that the claimant had submitted an incomplete estimate of the cost of the treatment, see N.H. Admin. R., Lab 507.05(a)(4), and insufficient evidence to show that the surgery would be successful, see N.H. Admin. R., Lab 507.05(a)(2), (3). The hearing officer, however, never reached

the merits of the claimant's request. See Appeal of Levesque, 136 N.H. 211, 214 (1992); RSA 281-A:23, I (1999). Under these circumstances, we cannot conclude that the doctrines of res judicata and collateral estoppel precluded the board from ruling upon the claimant's request for pre-approval of the surgery recommended by his doctor.

Finally, the City contends that the medical evidence fails to support the board's finding that the medical treatment and proposed surgery were causally-related to a work-related cumulative trauma injury. Specifically, the City argues that "there is no medical evidence . . . to establish that the claimant had a cumulative trauma injury with respect to his neck problems" and that this cumulative trauma is work-related. Additionally, the City asserts that "none of [the claimant's] treating physicians related the need for surgery to his employment with the City." Based upon our review of the record, we conclude that the board's findings are neither unjust nor unreasonable.

When, as in this case, the claimant seeks payment of medical bills only (rather than disability benefits), whether the claimant's need for medical treatment arises from trauma or cumulative trauma is immaterial. Appeal of Hypotherm, 152 N.H. 21, 24-25 (2005). As long as the claimant proves that his need for treatment arises from a compensable injury, he has met his burden of proof. See id. at 25.

Here, the medical evidence supports the board's finding that whatever the nature of the claimant's injury, it was causally related to his employment. Dr. Gundy, for example, opined that the claimant suffered a work-related injury in 1992 that "rendered [the claimant's] asymptomatic degenerative changes, symptomatic" and, "[i]n all likelihood . . . accelerated the degenerative process." Dr. Gundy further opined that "[a]fter the accident, [the claimant] had persistent neck pain which . . . has never completely resolved despite numerous courses of physical therapy." The opinions of other medical care providers corroborate Dr. Gundy's opinion. The medical record is replete with references to the claimant's persistent cervical pain caused by various work-related injuries.

Contrary to the City's assertions, the medical evidence also supports the board's finding that the claimant's need for surgery is causally related to his employment. Dr. Gundy specifically opined that "the surgery arises in part from [the claimant's] work-related injuries," specifically from a work-related accident in 1992. While Dr. Polivy disagreed with Dr. Gundy's opinion, "[w]hen faced with conflicting expert testimony, factfinders are free to disregard or accept, in whole or in part, that testimony." Appeal of Dean Foods, 158 N.H. at 474 (quotation and ellipsis omitted). To the extent that the City contends that Dr. Gundy's opinion is not competent medical evidence, we conclude that the City has failed to establish this. The City's arguments go to the proper weight to be given Dr.

Gundy's opinion; however, we reiterate that our role is not to reweigh the evidence. Id.

Based upon our review of the record, we conclude that the medical evidence supports the board's findings that the claimant suffers from a work-related injury and that the medical treatment and proposed surgery are causally related to that injury.

Affirmed.

DUGGAN, HICKS and CONBOY, JJ., concurred.

Eileen Fox,
Clerk