

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RONALD MUNSTER,
PLAINTIFF,

V

DOCKET #06-0238

CITY OF BATTLE CREEK,
SELF INSURED;
SECOND INJURY FUND/
VOCATIONALLY HANDICAPPED PROVISIONS,
DEFENDANTS.

APPEAL FROM MAGISTRATE REINHARDT.

JAMES T. HAADSMA FOR PLAINTIFF,
LEONARD M. HICKEY FOR DEFENDANT
CITY OF BATTLE CREEK, SELF INSURED,
MORRISON R. ZACK FOR DEFENDANT
SECOND INJURY FUND/
VOCATIONALLY HANDICAPPED PROVISIONS.

OPINION

PRZYBYLO, COMMISSIONER

Defendant City of Battle Creek, appeals the decision of Magistrate Paul Reinhardt, mailed September 18, 2006, denying defendant's request for reimbursement from the Second Injury Fund because res judicata barred its claim. We affirm.

FACTS

The facts involve only undisputed procedure. We accept the facts the magistrate summarized in his decision and adopt them as our own summary under MCL 418.861a(10). He wrote the following:

The History & Nature of These Proceedings

The current petition was not the first litigation involving these same issues and parties. They were previously before the Board of Magistrates on a petition

filed by the plaintiff on **12/27/2001**. In that earlier action the City filed an Application for Mediation or Hearing – Form C, seeking a determination that the SIF is responsible for benefits and for all compensation and cost[s] occurring after 52 weeks from the date of injury, and a determination that the SIF shall reimburse the City of Battle Creek for benefits paid, plus interest.

In an opinion mailed **4/30/2002** former Magistrate Crary Grattan ordered the following.

1 He awarded the plaintiff disability benefits and medical treatment for a 03/03/1997 date of injury.

2 He denied the City's claim against the SIF on the basis that it was not timely made pursuant to the requirements of MCL 418.925(1)[.]. That is, the City failed to comply with the notice provisions required under § 925(1)[.]. In doing so, Magistrate Grattan relied on the holding in *Robinson v General Motors*, 242 Mich App 331 (2000)[.]

The City's claim in that earlier case was virtually the same as the one made in the instant application by the City.

The course of Magistrate Grattan's decision on appeal was the following.

1 Magistrate Grattan's decision was affirmed on appeal by the Appellate Commission.

2 Review was thereafter denied by the Court of Appeals on the basis that the grounds alleged lacked merit.

3 Review was also denied by the Michigan Supreme Court on June 30, 2003. The reason by the Michigan Supreme Court was that the Court was not persuaded that the questions presented should be reviewed by the Court.

4 No further appeals were taken by any party.

THE CURRENT CLAIM

In this present action, the City essentially asks for a re-determination of the issues between it and the SIF, for reason that the decision of the Supreme Court in *Bailey v Oakwood Hospital and Medical Center*, 472 Mich 685 (2005) would operate to change the outcome of this case. The City further contends that the doctrine of res judicata should not apply here. It goes without saying that the SIF, which hotly disputed its liability in the earlier litigation, contends otherwise, suggesting that the matter having been fully litigated that any further proceedings must be dismissed due to the res judicata doctrine. Plaintiff took no position on this dispute between the City and the SIF and neither participated in oral argument nor submitted a brief.

The issues in the instant case were orally argued in Kalamazoo on the record on 1/11/2006. The City and SIF both submitted well-written memorandum briefs and supplemental briefs on the issue, and presented excellent oral argument.

FINDINGS

Bailey v Oakwood – Retro[a]ctive Application?

The claim of the City is grounded upon an assertion that the holding in *Bailey* would apply to its situation in litigation that completely ran its course two years before.

The City asserts in its brief that "... in *Bailey*, the Court holds that its decision is to be given retro[a]ctive application. 472 Mich at 704."¹

¹ Brief of City of Battle Creek, page 7.

The pro & con of the fact and extent of a retro[a]ctive application of the *Bailey* case may be open to discussion and debate. But, even an oblique reference to the issue is completely absent from the text on page 704 of the *Bailey* decision itself. True, the term "retroactive" appears at the end of page 704, but the Court is discussing the application of its holding in *Bailey* to the facts of that case.

PRIOR LITIGATION:

The previous litigation involving precisely the same parties and the same issues was final in all respects not later than the date for which a party could have appealed from or asked for reconsideration of the Order of the Michigan Supreme Court dated June 30 2003. The Plaintiff, the City, and the SIF were all represented by counsel and had full and ample opportunity to present their claims and defenses to Magistrate Grattan at trial, and to fully argue their positions on appeal, first to the Appellate Commission, and then to the COURT OF APPEALS and the Michigan Supreme Court. The issues presented and argued included that of whether or not the City was entitled to reimbursement from the SIF. Magistrate Grattan determined that it was not, and that finding was affirmed on appeal. [Magistrate's opinion, pp 1-3.]

LAW

The Worker's Disability Compensation Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the substantial evidence standard. We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After

our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). We expounded on these statutory mandates in *Isaac v Masco Corporation*, 2004 ACO #81, where we wrote the following:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Footnotes omitted.]

In addition to our review of the magistrate's fact findings, we also examine the magistrate's statements and applications of the law. We do so under a de novo standard.

The Michigan Supreme Court recently decided the *Bailey v Oakwood Hospital and Medical Center*, 472 Mich 685 (2005), which overturned several Court of Appeals decisions concerning the notice provisions of MCL 418.925. Section 925 requires carriers to notify the Second Injury Fund when a vocationally handicapped worker suffers an injury that will likely result in compensation beyond 52 weeks after the injury. Section 925 does not include a consequence if the carrier fails to notify the Second Injury Fund. The consequence, according to Court of Appeals' decisions, was that the carrier lost its right to reimbursement from the Second Injury Fund. Those decisions were overturned in *Bailey*. The Supreme Court held that the courts could not impose a consequence that the statute failed to include. Thus, even when a carrier fails to provide the Second Injury Fund proper notice under section 925, the Second Injury Fund remains liable to the carrier and must remain a party in the litigation.

However, *Bailey* did not include any discussion of the remaining statutes in Chapter 9 of the Worker's Disability Compensation Act, namely section 931. That section provides the Second Injury Fund certain rights during the litigation of a vocationally handicapped worker's claim. More specifically, subsection 4 guarantees the Second Injury Fund the right to appear, to cross-examine witnesses, and to give evidence. Those rights apply to both "the issue of liability of the employer to the employee and on the issue of the liability of the fund." MCL 418.931.

Bailey also failed to discuss whether its new interpretation of the notice provision in section 925 would allow a carrier to relitigate the Second Injury Fund's liability to reimburse a carrier after a final determination of the issue. We answer the question through application of res judicata. The Appellate Commission addressed the parameters of the res judicata doctrine in *Mace v LRH Carpentry & Aluminum Company*, 2000 ACO #194. In that case, we wrote the following:

So what is the status of res judicata in Michigan's worker's compensation system? To summarize, the Michigan Supreme Court in *Hlady* applied a traditional approach to res judicata, barring all claims that were or could have been raised in a prior action. In *Gose*, the Court followed the precedent set by *Hlady*, and clarified that the Court was using the traditional approach. However, in *Pike* and *Riley*, the Court deviated from the traditional approach and found that res judicata needed to be uniquely tailored towards the purposes and needs of the worker's compensation system. A majority of the Court in *Pike* and *Riley* recognized that res judicata "is not an inflexible doctrine, and its applicability depends in part upon the legal context in which a determination is made." The Court determined that res judicata does not preclude a redetermination of the "amount" of future benefits following an intervening change in the law. Based on the Court's decision in *Pike* and *Riley*, unless the re-litigation concerns the underlying entitlement, the elements of compensability (i.e. eligibility), res judicata will not preclude a subsequent petition following a change in the law. *Pike* and *Riley*, however, leave us with uncertainty as to when any change in the "amount" should take effect. [*Mace*, p 14.]

Applying the doctrine of res judicata to Chapter 9 cases, the Appellate Commission found that it did not bar a carrier from relitigating the issue of its right to reimbursement from the Second Injury Fund after final judgment. In *Pieser v Sara Lee Bakery*, 2006 ACO #312, we wrote:

Upon reading the Second Injury Fund's brief, we were initially inclined to believe that *County of Wayne v Hathcock*, 471 Mich 445 (2004) was fatal to Sara Lee's position because in *County of Wayne* retroactive application of the law changing decision accrued only to those cases pending when *County of Wayne* was released where the Poletown rule was challenged and the party making the challenge has preserved the challenge. In the instant case no claim pertaining to the issue involved was pending when *Bailey* was decided. The Court of Appeals had denied Sara Lee relief more than a year prior to the *Bailey* decision and Sara Lee did not seek relief, thereafter, with the Supreme Court.

However, upon further reflection we are convinced that Sara Lee is entitled to the relief sought in this litigation because in *Bailey* the Supreme Court did not limit retroactivity as it did in *County of Wayne, supra*. Furthermore, limited retroactivity in *County of Wayne* is understandable because the chaos and confusion which would occur with complete retroactivity. In the instant case, complete retroactivity would have a relatively small ripple in comparison to complete retroactivity in *County of Wayne*.

The long standing rule of law has been in favor of full retroactivity. See *Kuhn v Fairmont Coal Co*, 215 U.S. 349, 372, 30 S. Ct. 140, 54 L. Ed. 228 (1910); *Donohue v Russell*, 264 Mich 217, 219, 249 N.W. 830 (1933); 20 Am. Jur.2d, Courts, s 233, p 562. However, more frequently Courts are favoring more flexible approaches which allow determinations on a case-by-case basis. Where, as here, the Court has given no specific direction limiting the long standing rule of full retroactivity, we must assume the Court did not mean to limit it. Sara Lee's

entitlement to reimbursement begins June 29, 2005, the date of the Supreme Court decision in *Bailey*, supra. See *Gusler v Fairview Tabular Products*, 412 Mich 270 (1981) and *Riley v Northland Geriatric*, 431 Mich 632 (1988). [*Pieser*, p 5.]

We refuse to follow *Pieser* because the doctrine of res judicata precludes relitigation of the issues in certain cases. Although *Pieser* correctly held that relitigation of the Second Injury Fund's liability to an employer involves only legal questions, it ignores the Second Injury Fund's absolute right to litigate and challenge the employer's liability to the employee. Relitigating the employer's liability to the employee involves numerous factual and legal issues. Whenever the Second Injury Fund loses its right to appear and challenge the employer's liability because the magistrate dismissed it before or during the hearing, res judicata precludes relitigation of the case.

We also clarify the *Pieser* statements concerning the retroactive application of any decision that changes an interpretation of the Worker's Disability Compensation Act. Retroactive application of a statutory interpretation occurred in *Bailey* when the Court applied its interpretation of Section 925 to Oakwood Hospital's claim for reimbursement from the Second Injury Fund. However, the Court did not approve any "full retroactive" application that would allow a party to litigate claim, to exhaust all appellate opportunities, and then to relitigate the same issues. That form of "full retroactive" application requires a definitive statement from the higher court. It extends a case beyond final judgment. Thus, even when the Court abrogates the rights of future claimants, it does not change the outcome of final judgments. *Karaczewski v Farbman Stein & Company*, 478 Mich 28, 44 (2007), n 15.

APPLICATION

We find no reason to allow defendant to relitigate its claim against the Second Injury Fund. Under *Mace*, the first hearing and subsequent appellate procedures foreclose relitigation of the Second Injury Fund's liability to reimburse defendant. The appellate procedures afforded defendant the opportunity to present arguments that its failure to provide timely notice did not extinguish the Second Injury Fund's obligation to reimburse it after the initial 52 weeks following plaintiff's injury. Defendant argued that the Second Injury Fund waived any argument based on untimely notice. All appellate courts rejected the waiver argument. When they did so, the courts definitively ruled that defendant failed to present a compelling reason to enforce the reimbursement provisions of section 925. We uphold those definitive statements under our interpretation of res judicata as stated in *Mace*.

CONCLUSION

Therefore, we affirm the magistrate's decision.

Gregory A. Przybylo

Commissioner

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GLASER, CHAIRPERSON, CONCURRING IN PART AND DISSENTING IN PART

As a signatory to the *Pieser* opinion, I feel compelled to explain my change of position on the retroactivity issue. We relied on the long-standing rule of law that has been in favor of **full** retroactivity,¹ unless modified by the Court. In the case of *Bailey v Oakwood Hospital & Medical Center*, 472 Mich 685 (2005), the Supreme Court interpreted MCL 418.925 and the respective responsibilities of the insurance carrier and the Second Injury Fund. Oakwood Hospital had not given timely notice to the Second Injury Fund, that it expected Bailey's disability to last beyond 52 weeks, as required by the Act. The Court held that the Fund was not relieved of its obligation to reimburse Oakwood Hospital, despite the hospital's noncompliance. *Bailey* was a case of first impression for the Supreme Court overruling *Valencic v TPM, Inc*, 248 Mich App 601 (2001) and *Robinson v General Motors Corporation*, 242 Mich App 331 (2000). The question arose in *Pieser v Sara Lee Bakery* 2006 ACO #312, as to how far-reaching the pronouncement in *Bailey* should be. The *Bailey* Court gave no guidance. Under this circumstance, in *Pieser*, we followed the traditional full retroactivity rule.

Full retroactivity means that the new law would apply to any case, whether or not there had been a previous final decision on the merits, on that issue. Full retroactivity trumps the doctrine of *res judicata*. The courts often find that result to be undesirable, and limit the retroactive effect of any new pronouncement of law. There are several ways to do so.

The Court may order that the new law be applied prospectively. This means that only cases that have not yet been filed will proceed under the new law. Or that only the case in which the new law is developed and all future cases will be governed by it. *Parker v Port Huron Hospital*, 361 Mich 1 (1960).

¹ *Kuhn v Fairmont Coal Company*, 215 U.S. 349, 30 S.Ct. 140, 54 L. Ed. 228 (1910); *Donohue v Russell*, 264 Mich 217 (1933); *White v General Motors Corporation*, 431 Mich 387 (1988).

The Court may also order limited retroactivity. This can mean that all cases in which the issue has been preserved, but no final order issued, proceed under the new law. Or, it can mean that all cases which have not yet received a final order will be governed by it. Usually the Court will describe which form of limited retroactivity it desires, as it did in *Karaczewski v Farbman Stein & Company*, 478 Mich 28 (2007). Where the Court defines the legal effect of its ruling, as it did in *Karaczewski*, lower courts and tribunals can be more consistent in the application to various cases.

In recent years, it appears that the Court is more inclined to limit retroactivity, rather than apply full retroactivity or prospective only application.²

A three-part inquiry has developed to determine whether to apply full retroactivity, limited retroactivity or prospectivity to new law developed by the Court. The three factors are reliance, stability and finality. *Chevron Oil Company v Huson*, 404 U.S. 97 (1971).

Justice Moody explained a significant difference between the United States Supreme Court and the Michigan Supreme Court:

A significant difference in analysis between the United States Supreme Court and the Michigan supreme court has emerged with respect to evaluation of “the purpose of the new rule” criterion. While the federal high court has stated that purpose is the foremost consideration, the Michigan court appears to engage more in a balancing of all three factors. The additional emphasis on the factors of reliance and burden on the administration of justice produced by such a balance may result in greater limitations upon retroactivity in the Michigan courts than in the federal system. [28 Wayne LR 439 (1982), footnotes omitted.]

Our Supreme Court has announced its desire to back off of traditional full retroactivity for new case law:

It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result.

The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law. [*Placek v City of Sterling Heights*, 405 Mich 638 (1979).]

² *Socialist Workers Party v Secretary of State*, 412 Mich 571 (1982); *Hlady v Wolverine Bolt Company*, 393 Mich 368 (1975); *Pike v City of Wyoming*, 431 Mich 589 (1988); *County of Wayne v Hathcock*, 471 Mich 445 (2004).

Applying these factors to the instant case, we note that there is nothing in this record that speaks to reliance by the parties, on the previous interpretation of section 925. However, the *Bailey* interpretation did create a liability for the Second Injury Fund, where previously, under the exact same set of facts, it would have had none.

Justice Moody cautioned:

If a court creates liability where liability had previously been found not to exist, however, reliance of a party merits much more serious consideration. The concerns raised in this situation are analogous to those which led to the protection of individuals from retroactive expansion of the substantive criminal law and to the protection of individuals in a commercial setting. [28 Wayne LR 439 (1982).]

I would have to find that reliance by the Second Injury Fund weighs heavily against full retroactivity.

The second factor, stability, at first glance, does not seem to be significant. The Fund is set up for the purpose of reimbursing employers in an effort to encourage hiring of vocationally disabled individuals. MCL 418.901 et seq. Requiring the Fund to pay on cases previously decided in the Fund's favor, in and of itself, would not be a threat to stability of the system. However, as aptly pointed out by Commissioner Przybylo, such full retroactive application would have an adverse impact on all vocationally disabled claimants, who have successfully established a work related disability. It appears from section 931(4), that such claimants may be subjected to retrying their case. Here, however, the newly announced ruling has nothing to do with the particular merits of the injured worker's case. He had no right or obligation to notify the Second Injury Fund of the fact that he would be disabled beyond 52 weeks. In essence if full retroactivity is granted, this vocationally disabled individual could be placed in a position of disadvantage as compared to a non-vocationally disabled injured worker. This is exactly the injustice that Chapter 9 was designed to alleviate.

The probable injustice that would result from full retroactivity, and its resultant instability of the system weighs heavily against full retroactivity.

The third factor, finality, is where traditional full retroactivity and res judicata are in absolute conflict. Res judicata is a judicially created doctrine that holds a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. [Black's Law Dictionary, Fifth Edition.] In the area of workers' compensation, res judicata application has been riddled with exceptions.³ Here, the finality of a determination that the Fund was not liable to reimburse the employer/carrier, is outweighed by the finality of the injured worker's award. Again, finality weighs heavily against full retroactivity.

³ *Gusler v Fairview Tubular Products*, 412 Mich 270 (1981); *Riley v Northland Geriatric Center*, 431 Mich 632 (1988); *Page v Asplundh Tree Expert Company*, 172 Mich App 636 (1988).

It is clear to us that the courts are not bound by the traditional rule of full retroactivity. However where, as here, there is no guidance, I do not believe that this Commission has the authority to establish the limits. The Court of Appeals has recently granted leave to appeal in *Pieser*. Ultimately, I agree with the majority opinion that *Bailey* should be given limited retroactive effect. Unlike the majority, however, I believe that the Court must draw the line.

Martha M. Glaser

Chairperson

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RIES, COMMISSIONER, CONCURRING WITH COMMISSIONER PRZYBYLO

I agree with Commissioner Przybylo that res judicata bars the employer's claim for reimbursement. My reasons differ somewhat and, accordingly, this separate opinion is submitted.

Chapter 9 of the Act¹ is an extraordinary provision in the Act designed solely for the purpose of lessening the obligation of employers who hire individuals who are certified as vocationally handicapped. Simply by providing adequate and timely notice to the Second Injury Fund ("Fund") after a certain threshold has been reached, the employer is able to shift the entirety of its liability to make the payment of benefits under the Act to the Fund. The notice requirement, though not elaborate, is not a mere formality. Notice timely provided by the employer to the Fund may not be sufficient. *Tracer v City of Southgate*, 184 Mich App 811, 814, 816 (1990); lv den, 437 Mich 999 (1991). At the same time, the Fund cannot look behind the validity of the information provided in the notice. *Brown v Michigan Health Care Corporation*, 463 Mich 368, 376 (2000).

In the prior proceedings, the magistrate concluded that defendant-employer "failed to comply with MCL 418.925, after the March 1997 injury and is not entitled to reimbursement from the Second Injury Fund." [Magistrate's April 30, 2002 opinion, p 21.] As a result, he entered an order concluding that none of Chapter 9 was available as a limitation on the employer's liability to plaintiff. Compliance with MCL 418.925 is both mandatory, and the exclusive means by which an employer may avail itself of the limitations on liability found in Chapter 9.

The employer's argument, pure and simple, is that four tribunals "got it wrong" in the prior proceeding that was allowed to conclude in a final judgment. *Bailey v Oakwood Hospital and Medical Center*, 472 Mich 685 (2005), provides ample support for the employer's contention. That does not establish, however, that the previous, now final, orders can be overturned.

¹ MCL 418.901, *et seq.*

Although the parties and the other opinions case the question as simply being an attempt to discern whether *Bailey* may be applied retroactively, I view this question as having a quick answer that is uninformative of the ultimate result.

There is nothing within the four corners of *Bailey* that would lead one to fail to apply it to all cases (save one group, of which this case is one, see *infra*) with injury dates after the effective date of Chapter 9. *Bailey* did not change the law, it changed an interpretation of the law and, while the Court was free to limit the application of its opinion, it did not do so. Consequently, if we are presented with a case in which all of the facts came into existence after the effective date of the Act but prior to the issuance of *Bailey*, but which had not been litigated, there is no question but that we would utilize the standards in *Bailey* to render an award. This, in my view, is a retroactive application of *Bailey* (and a prospective application of Chapter 9) which conforms to the general rule. A limited retroactive application of *Bailey* would apply the rule only to those cases where the issue is preserved during the trial and appellate process. A prospective application of *Bailey* would apply it only to benefits payable after *Bailey* was decided.

The employer's argument in this case does not address the *amount* of benefits it is obligated to pay. This distinguishes this case from others that would seem to have a similar fact pattern. For example, in *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632 (1988), the Supreme Court held that the rate of an employee's workers' compensation benefits could be adjusted to take into account a calculation of the benefit rate that was erroneous in light of *Gusler v Fairview Tubular Products*, 412 Mich 270 (1981). In *Pike v City of Wyoming*, 431 Mich 589 (1988), the Supreme Court held that the employee's rate of compensation could be adjusted to take into account a finding that his wife could not be conclusively deemed to be his dependent, as had been held in *Day v W. A. Foote Memorial Hospital, Inc*, 412 Mich 698 (1982). In *Romein v General Motors Corporation*, 436 Mich 515; reh den, 437 Mich 1202 (1990); aff'd sub nom, *General Motors Corporation v Romein*, 503 US 181 (1992), it was held that the rate of benefits an employee received could be adjusted to take into account an elimination of coordination of benefits that the Court had authorized permitted to occur in *Franks v White Pine Copper Division, Copper Range Company*, 422 Mich 636; reh den, 424 Mich 1202 (1985). In each of these cases there was a final order which set the rate of benefits to be paid until further order, and the expectations of at least one of the parties in that final order was upset by a subsequent event (a case was decided, interpreting the statute differently, in *Riley* and *Pike*) or the law was changed (*Romein*). However, the changes only addressed the rate of benefits to be paid; the underlying entitlement to those benefits was not addressed or changed.²

The Legislature could not have more clearly established that a proceeding under Chapter 9 addresses an entitlement on the part of the employer to a reimbursement of benefits that goes beyond the amount of that reimbursement. In MCL 418.931(3), (4) and (5), the Legislature granted the Second Injury Fund the right to contest both the liability of the employer and the liability of the Fund:

² Another way to state this—important in the context of some cases—is that the remedy for an established cause of action was changed, not the cause of action itself.

(3) The fund, named as a defendant pursuant to motion, shall have 10 days after the date of mailing of notice of joinder to file objection to being named a party defendant. On the date of the hearing at which the liability of the parties is determined, the worker's compensation magistrate first shall hear arguments and take evidence concerning the joinder as party defendant. If the fund has filed a timely objection, and if the argument and evidence warrant, the worker's compensation magistrate shall grant a motion to dismiss.

(4) At the time of the hearing, the employer and the fund may appear, cross-examine witnesses, give evidence, and *defend both on the issue of liability of the employer to the employee and on the issue of the liability of the fund.*

(5) The worker's compensation magistrate shall enter an order determining the respective *liability* of the employer and the fund. [Emphasis supplied.]

The “liability of the employer and the fund” goes much further than the amount of wages, the amount of the benefit which is amenable to coordination, the number of dependents, and the like, which addresses the amount of the remedy after one has established the substantive right to that benefit. Subsumed in the concept of the “liability of the employer and the fund” is every issue extant in a workers’ compensation case, which is to say that it encompasses substantive rights.

In an administrative arena, substantive rights that have been adjudicated to finality cannot be redetermined. This is precluded by the doctrine of *res judicata* and no change of circumstances is presented that is legally sufficient. To be sure, there has been a “change in the law” if one equates the application of *Bailey* to this case in the same way as the Supreme Court held in *Pike* that one could utilize the holding in *Day* to adjust prior findings of spousal dependency made in orders that had become final. The analogy is not appropriate. The finding of spousal dependency solely addressed the remedy: the weekly checks to which a disabled employee *was otherwise entitled to receive* change by up to about \$13.00 per week, but no one contested that the check had to be written. Applying *Bailey* to this case to a final order addresses substantive rights, the liability of a party; it addresses the question of whether a check has to be written at all. The import of the prior proceeding is that a final order was enacted that established that the employer was not entitled to reimbursement from the Fund. The tribunal spoke through its order, not its opinion,³ which is to say that the rationale for the order that was expressed in the opinion is not what it is important so much as what is established by the order. When it was established that the employer was not entitled to reimbursement from the Fund—this being the sole purpose of Chapter 9—what was established is that this case does not fall within the extraordinary provisions of Chapter 9. Now, with the aid of *Bailey*, the employer seeks to establish that the prior order was wrong, but *res judicata* and collateral estoppel preclude such an argument. The argument that the prior order was wrong can only be made by way of an appeal, not in this collateral and subsequent proceeding.

³ *Tiedman v Tiedman*, 400 Mich 571, 576, note 2 (1977), and accompanying text, citing cases; *Kadri v Ford Motor Company*, 134 Mich App 138, 141 (1984).

In *Adair v State of Michigan*, 470 Mich 105, 121 (2004), the Supreme Court characterized the doctrine of res judicata as follows:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v. Clean Cut Mgt., Inc.*, 463 Mich. 569, 575, 621 N.W.2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v. Dart*, 460 Mich. 573, 586, 597 N.W.2d 82 (1999). [*Adair v State of Michigan*, 470 Mich 105, 121 (2004).]

This expression of the rule has been made in workers' compensation cases as well. *Gose v Monroe Auto Equipment Company*, 409 Mich 147, 160-161 (1980); *Hlady v Wolverine Bolt Company*, 393 Mich 368 (1975); *Banks v General Motors Corporation*, 271 Mich App 227 (2006).

Clearly, under any formulation of the rule of res judicata, the employer's current claim is barred. The prior action *was* (not just could have been) decided on the merits. The prior action *was* between the same parties. The matter in this case *was* resolved in the first case. There is such an identity between the prior action and the current action that this matter almost functionally serves as an appeal or rehearing of the prior action, except it is not (it is a new proceeding) and it cannot be (the administrative agency has no authority to grant a rehearing)⁴ an appeal or rehearing.

The rule expressed by the Supreme Court in *Hlady* stands as a preclusive bar to the relief the employer seeks, such that relief cannot be granted to the employer without a wholesale rejection of the discussion of res judicata in *Hlady*.⁵ The rule of law that emanates from *Hlady* is that "plaintiff may not concede an issue, necessarily determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court for relief. The doctrine of res judicata bars this from happening." [*Id.*, p 380.] This rule, as applied to whether one is entitled to relief, has never been altered. (It has been altered when the party seeks to adjust the amount of relief previously granted, but that is not this case.)⁶

In particular, *Socialist Workers Party v Secretary of State*, 412 Mich 571 (1982), does not alter the rule in *Hlady*. At its most basic level, *Socialist Workers Party* is an implementation of the

⁴ *Guss v Ford Motor Co*, 275 Mich 30 (1936).

⁵ The employer suggests that the Court's discussion of res judicata in *Hlady*, *supra* at 375-380, is dicta. I disagree. The Court's discussion of res judicata and the one-year-back rule in *Hlady* are both fully formed and well constructed. There is nothing in *Hlady*, or in subsequent cases, that could possibly lead one to believe that the discussion of res judicata was "made with less care and thoroughness than if it were crucial to the outcome." [*Bauer v City of Garden City*, 163 Mich App 562, 571 (1987).]

⁶ *Pike, supra*; *Riley, supra*; *Romein, supra*.

rule adopted by the Court in *Young v Detroit City Clerk*, 389 Mich 333, 338-339 (1973), three years before *Hlady*, as follows:

Where questions of law are involved, the courts have been reluctant to apply the rule of res judicata. The general rule is found in Restatement Judgments, s 70, pp. 318-319:

Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, *except where both causes of action arose out of the same subject matter or transaction*; and in any event it is not conclusive if injustice would result.

A proposed draft revision of this section, Restatement Judgments, 2d, Tentative Draft No. 1, 1973 states the following exceptions to the use of the doctrine of res judicata in s 68.1:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * *

(b) The issue is one of law and * * *

* * *

(ii) A new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws: * * *.

The purpose of this section is explained by the Commentary, as follows:

A rule of law declared in an action between two parties should not be binding on them for all time, *especially as to claims arising after the first proceeding has been concluded*, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position. [Emphasis supplied.]

This case does not fit within *Young* or *Socialist Workers Party* because it **does** concern the same cause of action, a cause of action that arises out of the same transaction or occurrence with the same subject matter, and it does **not** concern a claim that arose after the first proceeding

had been concluded. In *Young and Socialist Workers Party*, there was a new cause of action that arose out of the occurrence of a new election. In this case, there is no new cause of action and the claim which the employer asserts did not arise after the first proceeding had been concluded. There is only one cause of action for reimbursement from the Second injury Fund and a cause of action previously found lacking cannot be revived.

What was adjudicated in the first proceeding was that the employer did not present sufficient proof to establish that this case was a Chapter 9 case. Now, aided by no change of any kind except for the issuance of *Bailey*, the employer seeks to present precisely the same claim which failed previously. Surely, no court can imagine that every decision it issues may be applied to require a readjudication of every case in existence as if there had been no prior adjudication. If that were permitted, no party could gain any comfort from the entry of any order. Appellate deadlines would vanish. The prevailing party would be required to remain always at the ready to establish over and over and over again, not just the validity, but the correctness of the order. Res judicata does not, however, allow for an inquiry as to the correctness of the underlying decree. *Robertson v Phillips*, 311 Mich 582, 584 (1945); *Burkheiser v City of Detroit*, 270 Mich 381, 383 (1935).

There is a fair chance that the employer will be able, with the aid of *Bailey*, to establish that there was an error in the prior decision. Purported errors are corrected by appeal and, if they are determined not to be errors (as here), they are no longer errors, as the correctness of the order is no longer at issue.

The magistrate's order is correct and should be affirmed.

Granner S. Ries

Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RONALD MUNSTER,
PLAINTIFF,

V

DOCKET #06-0238

CITY OF BATTLE CREEK,
SELF INSURED;
SECOND INJURY FUND/
VOCATIONALLY HANDICAPPED PROVISIONS,
DEFENDANTS.

This cause came before the Appellate Commission on a claim for review filed by defendant City of Battle Creek from Magistrate Paul H. Reinhardt's order, mailed September 18, 2006, denying defendant's request for reimbursement from the Second Injury Fund because res judicata barred its claim. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Gregory A. Przybylo

Commissioner

Granner S. Ries

Commissioner