

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DIANNE L. BASS	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHNNY J. BUTLER et al.	:	NO. 98-4112

**Baylson, J.**

**December 6, 2005**

**MEMORANDUM**

**I. Introduction**

This case involves a constitutional due process challenge to the procedures utilized in Pennsylvania to decide workers' compensation claims. Plaintiff Diane Bass ("Plaintiff" or "Bass") filed a workers' compensation claim with the Pennsylvania Bureau of Workers' Compensation (the "Bureau") in November 1992. After a long and complex procedural history in state and federal courts summarized below, this case is now on remand for consideration of *res judicata* and collateral estoppel as to Plaintiff's facial constitutional challenge to the state statute. Presently before the Court are Motions for Summary Judgment filed by Plaintiff and Defendants.<sup>1</sup> After finding that Plaintiff has standing, the Court has concluded, as to the

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<sup>1</sup> Plaintiff on March 10, 2005 filed a Motion for Partial Summary Judgment on Defendants' Affirmative Defenses Based on Res Judicata (Doc. No. 50). Defendants then filed both a Response in Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. No. 53) and a Cross-Motion for Summary Judgment (Doc. No. 54) on March 31, 2005. Defendants' Response was very brief and incorporated the preclusion arguments provided in their Cross-Motion as a response to Plaintiff's Motion for Partial Summary Judgment. Plaintiff subsequently filed a Response to the Cross-Motion for Summary Judgment (Doc. No. 56) on April 25, 2005, providing further discussion of preclusion issues but also incorporating by reference the arguments in her original Motion for Partial Summary Judgment. Suffice to say that the Court has been amply briefed on the preclusion issues in this case, and it will consider in its analysis all

applicability of preclusion doctrine and the merits of the case, Plaintiff's complaint must be dismissed. An order to this effect was entered on November 30, 2005.

## **II. Factual and Procedural Background**

### **A. State Proceedings**

On November 30, 1992, Plaintiff filed a workers' compensation claim alleging that she suffered a workplace injury on December 20, 1990. She later amended the injury date to January 8, 1991. The parties bifurcated the issue of whether Plaintiff was injured in the scope of her employment. On October 28, 1994, WCJ Carol Mickey held that Plaintiff was injured within the scope of her employment, but before deciding the balance of the case, WCJ Mickey resigned, and Plaintiff's case was transferred to WCJ Peter Perry. Perry received additional testimony and evidence. However, before closing the record, he transferred the case to WCJ Michael Rosen. Plaintiff was never notified of the transfer.

On August 8, 1996, WCJ Rosen and WCJ Perry signed a decision denying Plaintiff's claim, and the Workers' Compensation Appeal Board ("WCAB") affirmed. Plaintiff appealed, arguing that she was denied due process by the participation of WCJ Rosen. The Commonwealth Court vacated the WCAB's order and remanded in order to allow Plaintiff to establish prejudice arising from the assignment of her claim to WCJ Rosen without notice. Bass v. Workers' Compensation Appeal Board (Howard D. Rosenman, M.D.), No. 182 C.D. 1998, slip op. at 8 (Pa. Commw. Ct. Aug. 12, 1998). After considering briefs and oral arguments, the WCAB concluded that Plaintiff failed to show prejudice. The WCAB reinstated its initial order

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arguments set forth in the pleadings described above. Oral argument was held on November 22, 2005.

denying relief. On February 18, 2000, the Commonwealth Court affirmed the WCAB's decision, concluding that although Plaintiff's facial challenge to § 415 was procedurally barred, this section was constitutional. Bass v. Workers' Compensation Appeal Board (Howard D. Rosenman, M.D.), No. 842 C.D. 1999, slip op. at 4-6 (Pa. Commw. Ct. Feb. 18, 2000) ("Bass v. WCAB II"). The Pennsylvania Supreme Court subsequently denied Plaintiff's petition for allocatur. Bass v. Workers' Compensation Appeal Board, 760 A.2d 856 (Pa. 2000). Plaintiff did not seek certiorari from the United States Supreme Court under 28 U.S.C. § 1257.

### **B. Federal Action**

On August 6, 1998, while her state court proceedings were ongoing, Plaintiff filed this suit under 42 U.S.C. § 1983 against the Secretary of Labor and Industry for the Commonwealth of Pennsylvania, the Director of the Pennsylvania Bureau of Workers' Compensation, and the Commonwealth of Pennsylvania.

In her complaint in this Court, she alleges that the Bureau denied her benefits through procedures which deprived her of rights guaranteed by the United States Constitution. Her complaint, styled as a class action (though no class action has as of this date been certified), asserts that the Bureau denied her claim without notice that her case had been reassigned to, and decided by, workers' compensation judges ("WCJs") who were neither present nor presiding when she and all of her witnesses testified. Plaintiff, who seeks declaratory and injunctive relief, costs and attorneys' fees, alleges that the state statute allowing WCJs to make credibility determinations and ultimate decisions without themselves hearing testimony violates due process, as guaranteed by the United States Constitution. That statute, § 415 ("§ 415") of the Pennsylvania Workers' Compensation Act, 77 Pa. Cons. Stat. § 851, provides as follows:

At any time before an award or disallowance of compensation or order has been made by a referee to whom a petition has been assigned, the department may order such petition heard before any other referee. Unless the department shall otherwise order, the testimony taken before the original referee shall be considered as though taken before the substituted referee.<sup>2</sup>

In a Memorandum and Order on April 30, 1999, this Court held that Plaintiff pleaded a protected property interest and that abstention was inappropriate because the workers' compensation proceedings were still in the administrative courts, which lacked the authority to decide constitutional issues. Bass v. Butler, No. 98-4112, slip op. at 7–8 (E.D. Pa. Apr. 30, 1999).

After holding hearings in which testimony was taken from WCJs Perry and Rosen, this Court dismissed Plaintiff's case without prejudice to her reinstating the suit after she exhausted her appeals in the state courts. Bass v. Butler, No. 98-4112, slip op. at 1–2 (E.D. Pa. Feb. 3, 2000). Shortly thereafter, the Commonwealth Court denied Plaintiff's second appeal. She moved in this Court for reconsideration, and her motion was denied because Plaintiff had still not exhausted all of her state appeals. Bass v. Butler, No. 98-4112, slip op. at 2 (E.D. Pa. May 18, 2000). This Court's order explained that Plaintiff could still appeal her state court action to the Pennsylvania, and then the United States, Supreme Courts. Id. Shortly after this Court's order, the Pennsylvania Supreme Court denied allocatur. Plaintiff did not seek certiorari from the United States Supreme Court, but did appeal this Court's dismissal of her federal complaint. The United States Court of Appeals for the Third Circuit vacated this Court's order dismissing and denying reconsideration of Plaintiff's complaint, and found that abstention of jurisdiction by the

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<sup>2</sup> Note that the term "referee" when used in the Workers' Compensation Act, means WCJ. 77 Pa. Cons. Stat. § 701.

district court was no longer applicable and Plaintiff's appeal was moot. Bass v. Butler, 258 F.3d 176, 179 (3d Cir. 2001). The Third Circuit remanded to this Court to determine the threshold issues in this case, particularly subject matter jurisdiction, and if that were found proper, preclusion and class certification. The Third Circuit explained its holding as follows:

Under the facts and posture of this case, we believe it appropriate for the District Court to determine in the first instance the threshold issues, including jurisdiction, preclusion, and class certification. Of course, if Bass passes the threshold, she will be entitled to full judicial process on the merits. The prudential value of having the benefit of District Court consideration and analysis outweighs the judicial economy of having the Court dispose of these issues now.

Bass v. Butler, 258 F.3d at 180.

Having vacated and remanded this matter, the Third Circuit directed this Court to determine the threshold issues in this case, particularly subject matter jurisdiction.<sup>3</sup> That examination was undertaken in a September 26, 2002 Memorandum and Order by this Court holding under the Rooker-Feldman doctrine that it lacked subject matter jurisdiction over both Plaintiff's as applied and facial challenges to § 415 of the Pennsylvania Workers' Compensation Act. Bass v. Butler, 224 F. Supp. 2d 950, 962 ( E.D. Pa. 2002). By opinion dated November 30, 2004, the Court of Appeals affirmed the dismissal of Plaintiff's as applied statutory challenge but vacated the dismissal of the facial challenge and remanded the action for a determination of whether preclusion doctrine bars that challenge to § 415. Bass v. Butler, 116 Fed. Appx. 376, 386 (3d Cir. 2004).

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<sup>3</sup> The Third Circuit noted that the "District Court would not reach [claim and issue preclusion] should the Court conclude that the Rooker-Feldman doctrine divests it of subject matter jurisdiction." Bass v. Butler, 258 F.3d at 180 n.2.

### **III. Legal Standard**

The standards by which a court decides a summary judgment motion do not change when the parties file cross-motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506, 1512 (E.D. Pa. 1993). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” F.R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” F.R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”

Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

#### **IV. Jurisdiction**

Because Plaintiff filed this suit under 42 U.S.C. § 1983, the Court has jurisdiction over the complaint pursuant to 28 U.S.C. § 1331. Venue is appropriate under 28 U.S.C. §1391.

#### **V. Discussion**

##### **A. Standing**

Defendants assert that Plaintiff lacks standing. The Supreme Court has stated that “[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, 422 U.S. 490, 498 (1975). Under well-established precedent, Plaintiff bears the burden of establishing the three requirements of standing, which are as follows: (1) a plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the plaintiff’s injury and the challenged conduct; and (3) it must be likely rather than speculative that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In evaluating standing, a court generally examines the complaint in an effort to determine “whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” Allen v. Wright, 468 U.S. 737, 752 (1984) (noting that relevant inquiries include “Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?”).

## **1. Defendants' Contentions**

In their brief, Defendants focus on the first and third standing requirements. Defendants argue that the Commonwealth Court found that Plaintiff was “not injured, prejudiced, or harmed” by the reassignment of her workers’ compensation case to a different WCJ and that there can therefore be no injury in fact. In reaching this conclusion, Defendants argue that factual findings made under the Pennsylvania workers’ compensation regime have preclusive effect in subsequent federal court proceedings. Defendants essentially argue that the determination by the WCJ, WCAB, and Commonwealth Court that Plaintiff was not prejudiced by the application of § 415 estops her from asserting any injury in fact in this federal suit. With no injury in fact, Defendants contend that Plaintiff does not have standing, and therefore the suit should be dismissed for lack of subject matter jurisdiction.

Defendants next argue that even if injury in fact is found by this Court, the redressability requirement of the standing doctrine should nonetheless prevent Plaintiff from proceeding with this suit. Specifically, Defendants contend that Plaintiff no longer has a pending workers’ compensation claim and that any change to the procedures under which such a claim is decided would provide only prospective relief, thus failing to redress any injury she may have suffered. Essentially, Defendants assert that Plaintiff failed to seek rehearing of her workers’ compensation claim within the statutorily prescribed eighteen-month period, see 77 Pa. Cons. Stat. § 871, and that even so, the final order issued by the Commonwealth Court divests the WCAB of any authority to grant a rehearing. Defendants argue that Plaintiff’s case became moot on February 18, 2000, when the Commonwealth Court ruled against her in Bass v. WCAB II. Without any

ongoing injury to the plaintiff, Defendants argue, there is simply no live case or controversy for the court to consider.<sup>4</sup>

## **2. Plaintiff's Contentions**

Plaintiff contends that the state court determination that her case was fairly decided does not deny her standing because that decision assumed that the statute in question was constitutional. Plaintiff argues that “standing arises because the statute was used in her case.” Pl’s Resp. at 8. Responding to Defendant’s argument about redressability, Plaintiff asserts that she will benefit directly from the statute being declared unconstitutional on its face. Bass argues that WCJ Mickey found that she sustained a work-related injury and that under the Workers’ Compensation Act, 77 Pa. Cons. Stat. § 531, she has the continued right to seek reimbursement for medical expenses. Plaintiff argues that if there were a dispute as to these expenses, a

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<sup>4</sup> Defendants acknowledge an exception to the rigorous application of the standing requirements in the case of First Amendment overbreadth or vagueness challenges to a statute, but the instant case, based on procedural due process, does not fall into that category. Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1253 n.13 (3d Cir. 1996), though involving a different factual setting, nicely addresses the issue of standing in the context of a non-First Amendment facial challenge:

Artway’s contention at oral argument that his challenge is both facial and as-applied does nothing to overcome his ripeness problem. In the limited context of the First Amendment, a facial challenge allows a litigant to argue that a law is unconstitutional — in a set of circumstances not necessarily present in his own case — on the basis of its “overbreadth.” Artway’s challenge obviously does not rely on the First Amendment. To make a successful facial challenge in a non-First Amendment context, a litigant “must establish that no set of circumstances exists under which the Act would be valid.” . . . In any event, a facial challenge does not — and cannot — excuse basic Article III case or controversy requirements, such as that the plaintiff actually be aggrieved by the challenged statute.

Artway, 81 F.3d at 1253 n.13 (citations omitted).

successful facial challenge could result in a situation in which a substitute WCJ hears live testimony of prior witnesses, thus making her injury redressable.

### **3. Analysis**

Two of the key values served by the standing doctrine are judicial efficiency and judicial decisionmaking. Judicial efficiency is promoted by preventing those with only an ideological interest in a case from filing suit. See United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Standing improves judicial decisionmaking “by ensuring that there is a specific controversy from the court and that there is an advocate with sufficient personal concern to effectively litigate the matter.” Erwin Chemerinsky, Federal Jurisdiction 58 (4th ed. 2003). In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court noted that standing requires a plaintiff to have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” Id. at 204.

Here, Defendants argue that Plaintiff was not injured, since her as-applied claim was rejected by the Commonwealth Court, effectively determining that she was not harmed by the reassignment of her workers’ compensation case to another WCJ. But Plaintiff is currently putting forth a facial challenge to § 415, and the Third Circuit, in its November 30, 2004 decision, stated that “the District Court could conclude that the resolution of Bass’s claim by a WCJ who did not hear the witnesses testify was a structural error depriving Bass of constitutional due process, regardless of whether she was prejudiced.” Bass v. Butler, 116 Fed Appx. at 384. Because this facial challenge concerns a potential structural error resulting from § 415, the injury requirement of the standing doctrine is satisfied in this case.

Defendants argue that the redressability prong of the standing test is not met since the conclusion of Plaintiff's workers' compensation case in the state courts effectively prevents this Court from affecting her current situation.<sup>5</sup> This Court holds that a determination that the state statute in question is unconstitutional would work to redress Plaintiff's injury, since § 415 was the basis for the substitution of WCJs which resulted in the denial of her workers' compensation claim. In remanding this case, the Third Circuit noted that "a federal court determination that Section 415 violates due process would render neither the state's actual prejudice determination erroneous, nor that judgment ineffectual." Id. It is clear from the factual and procedural background set forth above that Plaintiff has a personal stake in the matter at hand and that she has more than an ideological interest in its outcome. Plaintiff's claim is far from ideological — she was denied workers' compensation benefits by a second WCJ who did not hear the testimony in her case, and she seeks to challenge the constitutionality of the state statute which permits such substitutions. The Supreme Court has held that the characterization of the injury is often essential in a determination on standing, and looking at the injury in this case as a denial of broader rights allows for redressability when it might not otherwise be found. Northeastern Fla. Chapter Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 664–66 (1993)

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<sup>5</sup> As noted above, Plaintiff contends that future claims for medical benefits could result in invocation of § 415. Defendants argue that Bass has no right to file another workers' compensation claim based upon the same injury, as the litigated denial of an individual's original claim for injury benefits prevents further attempts to recover within the workers' compensation system for that same injury. Def's Post-Argument Mem. at 2–3 (citing Patel v. Workers' Comp. Appeal Bd. (Sauquoit Fibers Co.), 520 A.2d 525 (Pa. Commw. Ct. 1987); Patel v. Workers' Comp. Appeal Bd. (Sauquoit Fibers Co.), 488 A.2d 1177 (Pa. Commw. Ct. 1983)). While any attempt by Plaintiff to seek reimbursement for medical expenses may be foreclosed as a matter of law, the Court need not address this issue (or whether such a basis for redressability would be "speculative" under Lujan) in resolving the standing matter.

(injury in fact under the circumstances is not the ultimate denial of contract but the inability to compete on equal terms). This Court holds that in the facial challenge now at issue the Plaintiff has met the standing requirements because her injury is based upon an alleged general denial of procedural due process that would be remedied by a favorable decision declaring the relevant statute unconstitutional on those grounds. Assuming this Court would reach the merits and decide the merits in favor of Plaintiff, she would be entitled to relief.

## **B. Res Judicata**

The doctrine of *res judicata* encompasses two separate preclusion concepts: claim preclusion (also known as *res judicata* in its more narrow sense) and issue preclusion (also known as collateral estoppel). Defendants focus their argument on claim preclusion, while Plaintiff argues both types of preclusion in her briefs.

### **1. Plaintiff's Contentions**<sup>6</sup>

Plaintiff argues that she did not have a chance to litigate the facial challenge to the statute since she could not have included any such claim from the outset of her lawsuit. She references three state cases in asserting that she should not be precluded from raising issues which arose during the course of her workers' compensation case. Those cases are discussed briefly below.

In Hopewell Estates, Inc. v. Kent, 646 A.2d 1192 (Pa. Super. Ct. 1994), the plaintiff, which had hired a surveyor, filed a petition to open a judgment confessed on a note given for payment of professional fees of the surveyor. While the petition was still pending, plaintiff filed

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<sup>6</sup> Plaintiff incorporates by reference the arguments set forth in her Motion for Partial Summary Judgment. Those arguments will also be summarized in this section. Plaintiff's contentions are set forth first because the Motion for Partial Summary Judgment was filed first and the preclusion section in Defendants' Cross-Motion for Summary Judgment is largely a response to Plaintiff's motion.

a civil complaint against the surveyor claiming damages for professional negligence. The trial court granted defendants' motions for summary judgment based on the affirmative defense of *res judicata*. The appellate court reversed, however, holding that “[plaintiff’s] claim for professional negligence was not a claim which could properly have been raised in its petition to open the confessed judgment,” thus concluding that plaintiff’s failure to do so should not bar the negligence suit on claim preclusion grounds.

In Pontiere v. James Dinert, Inc., 627 A.2d 1204, 1210 (Pa. Super. Ct. 1993), plaintiffs filed suit alleging that defendant condominium owner was liable for repair costs of furnaces that were constructed in a defective manner. Defendant argued that a prior suit by plaintiffs concerning installation of the proper *type* of furnace should bar the current suit under principles of claim preclusion. The court rejected this argument, holding that the later suit stemmed from a latent defect in the furnaces discovered in 1991, four years after the initial action. Because the defects case could not have been brought earlier, claim preclusion did not apply.

Finally, in McArdle v. Tronetti, 627 A.2d 1219 (Pa. Super. Ct. 1993), plaintiff originally filed suit in federal district court alleging intentional constitutional violations and pendent state claims regarding conspiracy, professional malpractice, malicious use of process, and tortious conduct per se. The district court refused to exercise its discretion to consider the pendent claims. Plaintiff subsequently filed suit in state court alleging malpractice and other negligence-based claims. The Superior Court reversed the trial court’s application of claim preclusion, holding that despite a general similarity in the factual circumstances and the relief sought in the two cases, the doctrine did not apply, since “differences in factual allegations, along with the

disparity in proof that they render necessary, clearly demonstrate the distinct nature of the two sets of claims.” Id. at 1222–23.

Plaintiff cites these cases in an attempt to show that her inability to file constitutional claims at the outset of her suit should prevent an application of claim preclusion in this case. Plaintiff contends that in applying the doctrine of claim preclusion “it is unnecessary to search for similar issues that may have arisen *during the course of the case.*” Pl’s Mot. for Partial Summ. J. at 12 (emphasis added).

Plaintiff also makes a brief argument on the “identity of parties” requirement of the claim preclusion doctrine. She contends that the WCAB was included as a named party at the appellate level only to comply with the appellate rules and that the addition was merely for “docketing purposes.” Plaintiff argues that the WCAB had no interest in the case and did not take any positions with respect to the appeal one way or another. Id. at 16. Moreover, Plaintiff contends that because the suit in state court involved the employer (and his insurer), there can be no identity of the parties because they clearly had no interest in defending the constitutionality of the existing statute.

In addition, Plaintiff argues that issue preclusion and not claim preclusion is the relevant doctrine in analyzing the facial challenge to § 415. Rather than characterizing the facial challenge as a “claim,” Plaintiff maintains that it is an issue, and since it was not squarely addressed by the Commonwealth Court, she should be free to raise it again in the federal case. Therefore, unlike claim preclusion, issue preclusion cannot prevent this Court from considering the facial challenge because the issue was not raised in the state court action.

Plaintiff also contends that despite the Third Circuit ruling she should be permitted to raise her as applied challenge in the current suit. Citing Centifanti v. Nix, 865 F.2d 1422 (3d Cir. 1989), Plaintiff asserts that she did not have a full and fair opportunity to litigate the as applied constitutional challenge in state court and that she should thus be allowed to present that matter before this Court.

Centifanti involved an attorney plaintiff challenging his disbarment by the Supreme Court of Pennsylvania. Centifanti sued the Chief Justice and the Justices of the Supreme Court of Pennsylvania under 42 U.S.C. § 1983 alleging that the court-promulgated procedural rules governing disbarment violated the Due Process Clause and Equal Protection Clause of the United States Constitution. Id. at 1425–26. The Third Circuit wrote:

Centifanti does not dispute that res judicata may apply in such cases, but he argues that he did not have a realistic opportunity to raise his federal constitutional claims in the state court proceeding. We agree that on the record before us and in the factual context of his particular application for reinstatement, Centifanti did not have a realistic opportunity to fully and fairly litigate these issues.

Id. at 1430. Plaintiff argues that her situation directly parallels Centifanti and that she was not provided with an opportunity to litigate the as applied issue on appeal in state court.

## **2. Defendants' Contentions**

Defendants do not respond in detail to Plaintiff's contention that issue preclusion is the relevant doctrine regarding her facial challenge. Instead they simply argue that claim preclusion is the doctrine which bars the facial challenge in this case, acknowledging that issue preclusion would not be appropriate, since there was no actual decision in the state court proceedings as to the facial challenge.

As for the application of claim preclusion, Defendants contend that Plaintiff has admitted that a final judgment was entered against her in state court, Def's Mot. at 12. Therefore, Defendants focus their argument on what they see as the two relevant elements: the identity of the cause of action and the identity of the parties.<sup>7</sup>

Defendants contend that the Plaintiff, by failing to raise the facial constitutional challenge to § 415 in her first appeal to the Commonwealth Court, waived the issue. Defendants argue that Plaintiff *did* have the right to raise the constitutional issue in the state court but failed to do so and that the same cause of action was involved in state court as in the case now before this Court. Defendants note that the concept of "cause of action" for purposes of the analysis is very broad and asserts that Plaintiff was far too rigid in outlining its scope.

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<sup>7</sup> Both Plaintiff and Defendants agree that claim preclusion under federal law is substantially the same as in Pennsylvania, though the requirements are set out in a different form. See Def's Br. at 12 n.16; Pl's Mot. for Partial Summ. J. at 9. The Third Circuit formulation of claim preclusion requires: "(1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privies; and (3) a subsequent suit based on the same cause of action." Corestates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 194 (3d Cir. 1999); see also Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991) (same). Defendants correctly summarize the overlap of the federal and state requirements as follows:

In effect, the first and second Pennsylvania requirements correspond to the third federal [claim preclusion] requirement (same cause of action), and the third and fourth Pennsylvania requirements correspond to the second federal requirement (same parties or their privies). Under both analytical approaches, there must also be a final judgment in the earlier proceeding. While this is the first of the three stated federal requirements, Pennsylvania courts do not list the existence of a final judgment as a distinct [claim preclusion] requirement (in addition to the four other, typically listed requirements).

Def's Br. at 12 n.16. In this case, the parties have focused upon the second and third federal requirements, which, as stated above, correspond to all four of the Pennsylvania requirements. For purposes of discussion, the Court will refer to these requirements as identity of cause of action and identity of party.

Defendants argue to rebut two main arguments put forth by Plaintiff as to the cause of action prong. First, they assert that the fact that Plaintiff utilized 42 U.S.C. § 1983 in federal court and not in the Commonwealth Court should not be used in the analysis of the identity of the cause of action. Defendants contend that § 1983 is “merely a vehicle by which a constitutional claim may be raised” and does not confer any substantive rights. Def’s Br. at 15–16. The overarching legal claim in both arenas was due process.

Second, Defendants argue that the May 3, 1999 Memorandum and Order of this Court holding that this case and the state court case were not parallel for purposes of Colorado River abstention purposes does not definitively resolve the cause of action matter currently at issue. Defendants again contend that the focus should be not on the use of § 1983 in the federal suit but the reliance on the Due Process Clause in both cases. Defendants also note that both Third Circuit opinions in this case have referenced issues of preclusion, and that the second remand specifically stated that this Court should “determine whether res judicata or collateral estoppel bars Bass’s claim.” Bass v. Butler, 116 Fed. Appx. at 385. Finally, and most importantly, Defendants argue that when a cause of action ripens during a legal proceeding (as the due process issue did for Plaintiff here) and the party has an opportunity to raise it, it should not be determinative for preclusion purposes that the cause of action did not exist from the outset of the suit.

As for the identity of parties prong of the claim preclusion test, Defendants argue that the defendants in the state and federal cases are indeed different but that they are in privity with one another. The defendants in the state case were the WCAB and her former employer, while in federal court, the defendants were the Secretary of Labor and Industry and the Director of the

Bureau of Workers' Compensation (in their official capacities). Defendants contend that claim preclusion is warranted since "there is a 'close or significant relationship' between the 'successive defendants' in plaintiff's state and federal cases."<sup>8</sup> Def's Br. at 20.

### **3. Analysis**

Federal courts are required to give full faith and credit to state judgments when a prior case has been adjudicated in state court. 28 U.S.C. § 1738. The Supreme Court has held that in § 1983 cases federal courts should apply the same preclusion rules as would the courts of the state which issued the prior judgment. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85–87 (1984); see also Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189–93 (3d Cir. 1993) (examining claim and issue preclusion of a constitutional issue in an unemployment compensation case). In applying the preclusion doctrine in this case, the Court will therefore rely on the preclusion rules used in Pennsylvania state court.

#### **a. As Applied Challenge**

This Court first examines Plaintiff's contention that the as applied challenge continues to be viable. Plaintiff contends that the Supreme Court decision in Exxon-Mobil Corp. v. Saudi Basic Indus. Corp., 125 S. Ct. 1517 (2005) requires that this Court consider her as applied challenge. Exxon-Mobil, which interpreted the Rooker-Feldman doctrine more narrowly than the Third Circuit did in this case, was issued after the most recent remand. Defendants in their

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<sup>8</sup> Defendants also assert that Plaintiff could not have named identical parties in both suits even if she had desired to do so. They note that Pa. R. App. P. 1513(b) required her to name the WCAB as a respondent in her suit in Commonwealth Court, while the Eleventh Amendment prohibited such a tactic in federal court. Naming the Director and the Secretary in her § 1983 suit was required in order to avoid Eleventh Amendment immunity issues, but she was not permitted to name those defendants when seeking judicial review of a WCAB determination. Def's Br. at 20–21.

reply brief, argue that even considering the Supreme Court decision, this Court is still not free to reopen the as applied challenge. Writing on the scope of a remand from a reviewing court, the

Third Circuit held as follows:

[O]n remand for further proceedings after decision by an appellate court, the trial court must proceed with the mandate and the law of the case as established on appeal. A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length.

Blasband v. Rales, 979 F.2d 324, 327 (3d Cir. 1992) (quoting Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949 (3d Cir. 1985)). Therefore, this Court is bound by the Third Circuit's November 30, 2004 opinion, and, notwithstanding Exxon-Mobil, Plaintiff's as applied challenge must be considered dismissed.<sup>9</sup>

Looking beyond Plaintiff's Exxon-Mobil argument, the quoted language from Blasband requires this Court to assiduously follow the opinion of the reviewing court. Here, the Third Circuit has spoken explicitly on the as applied challenge, holding that this Court correctly applied the Rooker-Feldman doctrine and that the claim is therefore barred:

[T]he Commonwealth Court's finding that "the participation of WCJ Rosen did not deprive Bass of a fair adjudication by a qualified fact-finder" is enough to establish that it adjudicated Bass's as-applied claim on its merits. The District

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<sup>9</sup> It is also important to note that even if the as applied challenge was to be considered again, it would be barred under the doctrine of claim preclusion for the very same reasons described below in the discussion of the facial challenge to § 415. The application of the claim preclusion doctrine to the as applied challenge would, of course, be even more straightforward than its application to the facial challenge, and since the as applied challenge was actually litigated and decided, a lengthy discussion of the identity of claims or the opportunity to litigate at the state level would not be required.

Court therefore correctly concluded that the Commonwealth Court denied on the merits Bass's claim that Section 415 was unconstitutional as applied to her. Bass's attempt to characterize the decision on her as-applied claim as mere dicta is unpersuasive: The court considered her as-applied challenge in Bass I and remanded for fact-finding on the issue of prejudice, and in Bass II made a definitive decision that she had not suffered any prejudice, and therefore had not been deprived of due process.

Bass v. Butler, 116 Fed Appx. at 382 (citations omitted). The Court of Appeals has ruled that Plaintiff's as applied challenge was definitively decided in the state courts and this Court must and will follow the Third Circuit's determination on this matter.<sup>10</sup>

### **b. Facial Challenge**

Turning to the application of the preclusion doctrine to the facial challenge to § 415, this Court holds that contrary to Plaintiff's contentions, it is claim preclusion and not issue preclusion which must be applied. Plaintiff has provided ample case law in support of their argument that issue preclusion is not appropriate when the issue at hand was not actually litigated in the prior case. See Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988) (holding that issue preclusion

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<sup>10</sup> Plaintiff's reliance on Centifanti v. Nix is misplaced, as that case dealt with disciplinary hearings relating to disbarment. The Centifanti court determined that the state court proceedings (reinstatement proceedings before the hearing committee, Disciplinary Board, and the state supreme court) did not provide an opportunity for full and fair litigation of the constitutional issues. Comparing the matter to District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), the Third Circuit noted that, "As in Feldman, Centifanti's claims reflect 'general challenges to state bar rules, promulgated by [a] state court[ ] in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case.'" Centifanti v. Nix, 865 F.2d 1422, 1429 (3d Cir. 1989). Bass, on the other hand, appealed her case to the Commonwealth Court and was given the opportunity to raise, and did raise, a constitutional challenge to § 415. The as applied constitutional challenge which Bass seeks to litigate in this Court does not involve a challenge to rules promulgated by a state court in "nonjudicial proceedings" but instead is a clear attempt to attain review of a final state court judgment. Thus, unlike Centifanti, Bass "run[s] afoul of the prohibition against appeals of state court decisions in lower federal courts," *id.*, and her as applied challenge cannot be considered by this Court.

“does not prevent reexamination of issue that might have been, but were not litigated in an earlier action”); Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62, 68 (3d Cir. 1978) (“Unlike the situation with res judicata, the judgment is not conclusive as to issues which might have been, but were not litigated in the original action.”). There is no debate, however, as to the applicability of issue preclusion, as Defendants agree that the doctrine does not apply to the facial challenge, since no facial challenge was actually litigated during the state court proceedings.

Because the inapplicability of issue preclusion has been conceded, the heart of the Court’s analysis involves the application of the doctrine of *claim* preclusion to the facial constitutional challenge. Under Pennsylvania law, the application of claim preclusion requires “the concurrence of four conditions between the present and prior actions: (1) identity of issues; (2) identity of causes of action; (3) identity of parties or their privies; and (4) identity of the quality or capacity of the parties suing or being sued.” Radakovich v. Radakovich, 846 A.2d 709, 715 (Pa. Super. Ct. 2004) (citing Yamulla Trucking & Excavating Co. v. Justofin, 771 A.2d 782, 784 (Pa. Super. Ct. 2001)). In applying the four prongs of the claim preclusion test, this Court holds that both the cause of action and the parties are identical for purposes of claim preclusion under Pennsylvania law.

Looking first at the identity of the causes of action, the language of the Commonwealth Court’s decision in Bass v. WCAB II indicates that Plaintiff had the opportunity to put forth her constitutional claims in the first case but failed to do so:

Bass cannot now assert for the first time that Section 415 of the Workers’ Compensation Act is unconstitutional. By her failure to challenge the constitutionality of Section 415 in her first appeal to this court and failure to notify the Attorney General of a facial attack on the statute, Bass has waived this issue.

Bass v. Workers' Compensation Appeal Bd. (Howard D. Rosenman, M.D.), slip op. at 4 (Pa. Commw. Ct. Feb. 18, 2000). It is clear under Pennsylvania law that in reviewing workers' compensation decisions, the Commonwealth Court has the authority to determine whether the agency adjudication violates the Constitution, is contrary to law, or is based on a finding of fact that is not supported by substantial evidence. 2 Pa. Cons. Stat. § 704.

Though Plaintiff contends that Pennsylvania case law indicates that claim preclusion should not apply in this case, the Hopewell, Pontiere, and McArdle decisions involve situations distinguishable from the opportunity to litigate which Bass had in this matter. Both Hopewell Estates, Inc. v. Kent and Pontiere v. James Dinert, Inc. involved scenarios in which the subsequently raised claim *could* not have been brought in the prior proceeding. A quick review of the Commonwealth Court opinion in Bass v. WCAB II indicates that claimant was not so hindered in her appeal.

In addition, McArdle is distinguishable because here there was no jurisdictional bar to Plaintiff bringing her facial challenge in the Commonwealth Court when she raised the as applied claim. In McArdle, the Plaintiff brought the initial action in federal court and attempted to raise pendent state claims in that suit. A subsequent suit including the same state claims was not barred under claim preclusion only because the federal court had declined to exercise jurisdiction over the pendent state claims as a matter of discretion. 627 A.2d at 1223 (citing Restatement (Second) of Judgments § 25, cmt. e). The instant case is clearly distinguishable, since the Plaintiff did in fact raise her as applied constitutional challenge in the initial state court proceeding and the Commonwealth Court considered it. Moreover, the Commonwealth Court

did not decline to exercise jurisdiction over Plaintiff's attempted facial challenge but simply held that it should have been raised concurrently with the as applied challenge.

The Third Circuit has held that “[b]ecause the courts have not defined precisely ‘causes of action,’ for claim preclusion purposes, we take a broad view, focussing on the underlying events of the two actions.” Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999) (citing United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)); see also Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991) (stating that the court should consider the “essential similarity of the underlying events giving rise to the various legal claims” and “whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same”); Chada v. Chada, 756 A.2d 39, 43 (Pa. Super. Ct. 2000) (“The form in which the two actions are commenced does not determine whether the causes of action are identical.”). While the Third Circuit has specifically stated that defining “cause of action” involves inherent conceptual difficulties, it has stated that “claim preclusion ‘generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarly has proved elusive.’” Chehi, 843 F.2d at 117 (quoting Davis v. U.S. Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982) (en banc)).

In this case, the constitutional challenge which Plaintiff attempts to raise in federal court is based upon the very same incident — the replacement of a WCJ during the course of a workers’ compensation hearing — which spawned the as applied challenge in the Commonwealth Court. Plaintiff was clearly permitted to raise both the as applied and facial challenges, as the Pennsylvania Rules of Appellate Procedure allow for the constitutional

challenges of state statutes. The fact that Plaintiff was able to raise her as applied constitutional challenge in Commonwealth Court allows this Court to conclude that she could have, but did not, assert her facial challenge in that court.

This Court rejects Plaintiff's contention that her inability to raise the constitutional claim at the outset of her case (i.e. during the workers' compensation hearings or before the WCAB) necessarily prevents "identity of cause of action" for claim preclusion purposes. While it is true that claim preclusion would not bar a cause of action that did not yet exist at the time the prior legal proceeding came to an end, see, e.g., Pontiere, 627 A.2d at 1210 (claim preclusion not a bar when relevant defects not discovered until years after the conclusion of the prior action), when a cause of action ripens during the course of a legal proceeding, and a party takes the opportunity to explicitly raise it in the course of those proceedings, that party should be bound by the claim preclusion doctrine when trying to relitigate the matter in a subsequent suit. As the Third Circuit noted in remanding this case, "[w]hether she did so properly, Bass clearly made an attempt to have the state court consider her federal constitutional claims." Bass, 116 Fed. Appx. at 383 n.9. In light of this Circuit's broad interpretation of "cause of action" for claim preclusion purposes, the Court holds that Defendants have met their burden of showing identity of cause of action between the state court suit and the instant action.

As for the "parties" prong of the claim preclusion test, the Court holds that there is privity between the parties, since the WCAB is considered an actual party in the state suit. The Third Circuit has held that "res judicata may be invoked against a plaintiff who previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants." Gambocz v. Yelencsics, 468 F.2d 837, 841 (3d

Cir. 1972). Plaintiff's contention that the WCAB was added only to comply with appellate rules is less than convincing, as the rules would seem to require inclusion of such a party in order that constitutional challenges, like the one presented by Plaintiff, are set forth against some party (even if in name only) that would have an interest in maintaining the statute in question. If the mandated inclusion of the WCAB by appellate rule does not count for purposes of claim preclusion, then any constitutional challenge litigated in the state courts could always be reargued at the federal level, since procedural rules required the Plaintiff to file suit against different parties in the two suits. The naming of individual parties in the federal action does nothing to defeat the privity of the parties. The Third Circuit has held that "[i]n the claim preclusion context, governmental officials sued in their official capacities for actions taken in the course of their duties are considered in privity with the governmental body. . . . They may invoke a judgment in favor of the governmental entity as may that body itself." Chehi, 843 F.2d at 120. The Court therefore holds that the parties are identical for purposes of claim preclusion.

Because Defendants have satisfied their burden in demonstrating both the identity of the cause of action and the parties, Plaintiff's facial constitutional challenge to § 415 is barred by the doctrine of claim preclusion.

### **C. Merits**

Assuming, *arguendo*, that Plaintiff's facial constitutional challenge is not barred by claim preclusion, the Court considers whether § 415 of the Pennsylvania Workers' Compensation Act is constitutional.

## **1. Defendants' Contentions**

Defendants argue that a facial challenge to a statute is an exceptionally difficult burden to meet and that because Bass's as applied challenge was rejected by the Commonwealth Court, her facial challenge cannot succeed. In addition, Defendants assert that § 415 by its terms does not prescribe a decision-making procedure that is per se unconstitutional. Def's Br. at 24. Here, Defendants focus on the "unless the department shall otherwise order" language in the second sentence of § 415, arguing that claimants' right to a fair adjudication is protected by this "safety valve." *Id.* at 25–26. Moreover, if a workers' compensation plaintiff thinks a successor WCJ's decision is unfair, he still has the ability to appeal to the WCAB and the Commonwealth Court.

## **2. Plaintiff's Contentions**

Plaintiff argues that credibility determinations can be made only by the adjudicator hearing live testimony. She cites United States v. Raddatz, 447 U.S. 667 (1980), which held that "a district judge, in the exercise of sound judicial discretion" was permitted to place whatever reliance he so chose upon the proposed findings and recommendations of a magistrate. *Id.* at 676. Plaintiff also cited United States v. Mortimer, 161 F.3d 240 (3d Cir. 1998), which held that the absence of a judge during parts of a trial was fundamental error of constitutional proportion that creates a structural defect in the proceedings entitling the litigants to a new trial. PI's Resp. at 20–21.

In determining whether the statute deprives claimants of due process, Plaintiff cites the test articulated by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), which requires a balancing of the three following factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the

procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Id. at 335.

A brief review of Plaintiff’s assessment of these three factors follows. As to the first, Plaintiff asserts that the parties in workers’ compensation cases have a strong interest in having cases decided by judges competent to decide credibility, since the system functions as a substitute for tort suits and medical benefits can be quite significant, lasting as long as a lifetime. Looking at the second factor, Plaintiff contends that the risk of erroneous deprivation is great, since credibility findings are meaningless unless based on personal observation. She argues that virtually all workers’ compensation proceedings turn on the credibility of the witnesses and the statute in question makes a wrong decision on credibility irreversible “as a practical matter.” Pl’s Resp. at 24. Finally, Plaintiff contends that the burden of a corrective procedure would be minimal, since supplementing the record with fresh testimony of witnesses will only be necessary when the parties and/or judge determine that credibility is at issue on material questions of fact.

### **3. Analysis**

Assuming that Plaintiff’s facial challenge is not barred by claim preclusion, Defendants would still be entitled to summary judgment on the merits.

Section 415 of the Pennsylvania Workers’ Compensation Act authorizes the Bureau to substitute one WCJ for another in a workers’ compensation proceeding. The language of § 415 at issue provides as follows: “Unless the Department shall otherwise order, the testimony taken before the original referee shall be considered as though taken before the substituted referee.”

77 Pa. Cons. Stat. § 851.

Defendants argue that Plaintiff is unable to meet the rigorous standard required to mount a successful facial challenge to a statute and cite United States v. Salerno, 481 U.S. 739 (1987), which held that in a successful facial challenge “the challenger must establish that no set of circumstances exists under which the act would be valid.” Id. at 745; see also Artway v. Att’y Gen. of N.J., 81 F.3d 1235, 1252 n.13 (3d Cir. 1996) (“To make a successful facial challenge in a non-First Amendment context, a litigant ‘must establish that no set of circumstances exists under which the Act would be valid.’”). However, the Third Circuit, in remanding this case, noted that this Court can still have jurisdiction over the facial challenge to § 415 notwithstanding the state court determination of fairness to Bass. Bass, 116 Fed. Appx. at 384. In reaching this conclusion, the Third Circuit cited District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), in which the United States Supreme Court held that “the plaintiff’s claims that the relevant legal practice admission rule was unconstitutional were not barred by the D.C. court’s earlier decision that the rule was fair as applied to the plaintiffs.” 116 Fed. Appx, at 384. Therefore, following the mandate of the Third Circuit, this Court assumes subject matter jurisdiction over the facial challenge and considers its merits despite Plaintiff’s failed as applied challenge in the state courts.

Though Plaintiff cites United States v. Raddatz in support of her claim that substitute WCJs should not make credibility determinations from the record, the holding in that case provides less support for her argument than she asserts. The Court in Raddatz held that in reviewing the decisions of the magistrate, a district court judge has broad discretion to determine whether to accept, reject, or modify proposed findings, including hearing the witnesses live in

order to resolve conflicting credibility claims. Id. at 680. Because this ruling would apparently permit a judge to rely on a transcript in reviewing or modifying a magistrate's finding (the trial judge is given “broad discretion” in how to proceed), Raddatz does not necessarily support Plaintiff’s position. Though not mentioned by Plaintiff, the only distinction which may lend support to Plaintiff's claim is that in Raddatz the *judge* has the ability to decide whether further testimony is required, while § 415 would only permit the *department* to “otherwise order” that transcription testimony was not sufficient for a credibility determination by the substituted WCJ.<sup>11</sup>

Also, the Mortimer case does not appear to be on point, since it involves a situation in which a judge was not present during a trial, holding that “there is no trial . . . the structure has been removed.” 161 F.3d at 241. Mortimer involved the unexplained and unannounced absence of a judge during summation for the defense, which was not particularly relevant to the credibility assessments at issue in Plaintiff's argument on the merits in the instant case.

In arguing that § 415 deprives claimants of procedural due process, Plaintiff applies the facts of this case to the test devised by the United States Supreme Court in Mathews v. Eldridge. The Mathews test requires an analysis of each of its three factors set forth above.

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<sup>11</sup> It is a relevant question whether a substitute WCJ can, on his own, order live witness testimony in a workers’ compensation case if he finds that there is an issue of credibility which transcript testimony will not resolve. Defendants appear to believe that the language of § 415 does give WCJs such power. See Def’s Br. at 26 (“[I]f for some reason it is recognized that witness demeanor will likely be a factor in the eventual analysis of the record in a particular case, § 415 enables the Department (or the successor WCJ) to enter an appropriate order to address the situation (for example, requiring a witness to testify again, before the successor WCJ).” (emphasis added)).

The first factor is the private interest at stake. Workers' compensation claimants have an interest in an adequate administrative hearing that properly takes account of the credibility of the parties testifying. Also, when it comes to on the job injuries, the workers' compensation system operates in place of the tort suits stemming from such injuries, so claimants clearly have a significant interest in obtaining proper reimbursement for injuries sustained in a work-related accident. The Court is therefore persuaded that the private interest is a significant factor in the Mathews calculus.

The second factor in the Mathews test, the risk of erroneous deprivation and the probable value, if any, of substitute procedural safeguards, requires an examination of the relevant Pennsylvania case law on § 415 as well as consideration of the existing procedures and an assessment of the value of any additional safeguards that may be required.

In Bass v. WCAB II, the Commonwealth Court rejected Plaintiff's as applied challenge, stating as follows:

[T]he assignment of WCJ Rosen did not replace WCJ Perry as the fact-finder in the instant case. Both Judges signed the decision. After WCJ Rosen's assignment, WCJ Perry continued in the role as fact-finder albeit sharing that function. Although Rosen may have authored the decision, the decision nevertheless retains the benefit of Perry's assessments as to credibility and evidentiary weight. In sum, the participation of WCJ Rosen did not deprive Bass of a fair adjudication by a qualified fact-finder.

Bass v. Workers' Compensation Appeal Board (Howard D. Rosenman, M.D.), No. 842 C.D. 1999, slip op. at 5–6 (Pa. Commw. Ct. Feb. 18, 2000).

In Arena v. Packaging Systems Corp., 507 A.2d 18 (Pa. 1986), the Pennsylvania Supreme Court held that the same deference must be accorded to the findings of a substituted referee who heard live testimony. Id. at 19 n.2. The Arena court noted that there are two bases for the

deference given to referees' determinations: "(1) generally it is the referee who observes the witnesses and who is in the best position to rule on the credibility of the witnesses; and (2) the referee, as well as the Board, deals exclusively with workmen's compensation cases and has developed expertise in the area." Id. Just as in Arena, the substitution of the WCJ in the instant case may have removed the first basis for deference to the fact finding of the referee, but the second basis remains highly relevant and the "findings must be accepted where the record reflects substantial evidence to sustain them." Id.

In Biagini v. Workers' Compensation Appeal Board (Merit Contracting Company), 632 A.2d 956 (Pa. Commw. Ct. 1993), the Commonwealth Court addressed a claimant's contention that his due process rights were violated when a decision was issued by a substitute WCJ who had not observed the live testimony in the case. The Biagini court noted:

[T]he practice of one tribunal assessing credibility and rendering a decision where another tribunal has received the actual testimony is nothing new in the law. To the contrary, in unemployment compensation cases it is the referee that conducts evidentiary hearings, while the Unemployment Compensation Board of Review is the ultimate factfinder and issues findings of fact and conclusions of law.

632 A.2d at 957. The substitute WCJ provision therefore appears to have withstood challenges very similar to the one put forth by Bass in this facial constitutional claim.

Since the plaintiff in Biagini failed to "delineate in what manner his due process rights [were] diminished by the substitution," the court did not squarely address the constitutionality of § 415. Id. at 958. Nonetheless, the court's citation to Arena indicates a general skepticism that the Plaintiff would have been able to show that there would have been a different result without the substitution.

In Peak v. Unemployment Compensation Board of Review, 501 A.2d 1383 (Pa. 1985), another case cited in Biagini, the Pennsylvania Supreme Court held that it was not a due process violation for the Unemployment Compensation Board of Review to reassess a referee's credibility determinations as long as the Board sufficiently explains its decision and is subject to judicial review. Id. at 1389. Though the Workers' Compensation Review Board, unlike the Unemployment Compensation Review Board, is bound by the credibility determinations of the WCJs, the court's language concerning credibility determinations is still relevant. The Peak court stated:

At bottom, appellant's proposition that the referee should have the exclusive power to resolve credibility issues is based on the notion that credibility evaluations depend on the observation of live witnesses while they testify. Such observation is often important, but it is not the only factor to be considered in deciding who is to evaluate credibility on conflicting evidence. Considerations of expertise, uniformity of decision and control over policy are also relevant. Besides, a rule embodying that proposition would preclude a factfinder from weighing depositions against live evidence, or documents or exhibits against witness's testimony, a practice common and necessary in both administrative and judicial fact finding. We decline to adopt such a rule.

Id. at 1389–90.

Defendants argue that cases in which credibility is an issue are relatively rare and therefore that credibility issues in cases involving a substituted WCJ are exceptionally rare. The Defendants contend that the risk of erroneous deprivation is not so great and quote Mathews on that point: "To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

Though the parties disagree as to the frequency with which issues of credibility are determinative in workers' compensation, this fact is not decisive in assessing the second Mathews factor. Whether or not Plaintiff is correct in asserting that credibility assessments are exceedingly common in workers' compensation cases, the relevant Pennsylvania case law indicates that credibility determinations made by substitute referees or WCJs are still to be given deference and accepted where the record demonstrates substantial evidence to sustain them. See Arena, 507 A.2d at 19 n.2; Biagini, 632 A.2d at 651. The risk of erroneous deprivation of due process under § 415 is thus very low.

As for the probable value of any additional or substitute procedural safeguards, Defendants argue that the very language of § 415 already provides flexibility for supplemental live testimony when necessary. Moreover, they assert that the workers' compensation system supplies sufficient process in cases of substitution, as aggrieved parties can appeal to the WCAB and the Commonwealth Court if they deem the replacement WCJ's decisionmaking unfair. The flexibility of the statutory language and the existing avenues for appeal of a decision by a substitute WCJ both diminish the value of any additional safeguards. The qualifying language of § 415, "[u]nless the department shall otherwise order," clearly does not mandate in every case that "the testimony taken before the original referee shall be considered as though taken before the substituted referee," so the statute does not by its terms require the successor WCJ to rely on the paper record in making credibility determinations.<sup>12</sup>

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<sup>12</sup> Plaintiff argues that the "Department" has never issued a formal order requiring a substitute WCJ to rehear testimony taken by the initial WCJ. In the July 21, 2005 deposition of David Cicola, the Director of the Workers' Compensation Office of Adjudication, see Pl's Supp. Mot. in Opposition, Ex. A, the deponent indicated, however, that there is an informal practice whereby substitute WCJs will accept additional evidence to give both sides a fair hearing.

The ability of workers' compensation claimants to appeal to the WCAB and the Commonwealth Court any decisions by a substitute WCJ makes the additional safeguards proposed by Plaintiff less valuable, since any mistake can be corrected during the appeal process.

The Court therefore concludes that the risk of erroneous deprivation is insignificant and, in light of the statutory language and the opportunity for appeal, that the value of additional safeguards is minimal. The second Mathews factor will therefore be given little weight in the balancing scheme.

Finally, the Court must examine the third Mathews factor, "the Government's interest and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. The government clearly has an interest in ensuring both fair procedures and also that only employees legitimately injured on the job receive workers' compensation benefits. The government similarly has an interest in maintaining as efficient a process as possible so as to assure that both claimants and employers receive a prompt hearing and decision in their case. Because of death, resignations, illness, and scheduling issues, the change of a WCJ before all proceedings are completed is sometimes necessary. The alternative would be to start over again with a new WCJ, at considerable cost and delay.

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Cicola Dep. at 23. While Cicola acknowledged that there were no written procedures which outlined this "general practice," he stated that he knew of specific instances where the WCJ has given the parties an opportunity to offer evidence after the case has been transferred and the record closed. Id. at 25–26. Cicola noted that WCJs are "agents of the Department and are charged with management of the cases," and said that he was "sure there were orders made by judges regarding the scheduling of testimony in reassigned cases." Id. at 20. Though Plaintiff continues to argue that the language of the statute is facially unconstitutional because it prevents consideration of witness credibility by substitute WCJs, the Cicola deposition indicates that WCJs can, and have, ordered additional testimony when it was deemed useful for a fair hearing.

As the discussion of the value of additional safeguards indicates, it is difficult to assess the costs that would be imposed by the additional procedural safeguards Plaintiff argues are necessary, since it is unclear how often these new procedures would need to be invoked. Plaintiff contends that the additional procedures required would be minimal, since the existing record would only need to be supplemented with live testimony when the parties and/or WCJ determine that credibility is an issue on material questions of fact. This itself could become an issue. Plaintiff cites F.R. Civ. P. 63 as a model substitute for the challenged language in § 415, since that rule gives the parties the right to call witnesses whose testimony is material and disputed when a new judge takes over from another judge during the course of a trial. However, Plaintiff failed to present any authority that such a procedure is constitutionally mandated.

While it is difficult to gauge the actual increase in cost and time which would result from the implementation of additional process, the sheer volume of workers' compensation hearings held each year makes it likely that it would be relatively significant. Since the adjudicatory process in the workers' compensation system is one designed to deal as swiftly as possible with a large volume of claimants, further delays in the processing of claims would hinder the government's interest in administrative efficiency.

Although it is nearly impossible to ascertain the burden on the government which would result from declaring § 415 unconstitutional, the Court concludes that the additional procedural requirements would impose some costs on the government and would also slow the administrative process for those making claims under the Pennsylvania workers' compensation system. Just as the private interest in this case is quite significant, the government interest is also very high.

A balance of the Mathews factors yields the conclusion that § 415 of the Pennsylvania Workers' Compensation Act does not deprive claimants of due process. Therefore, the Court rejects Plaintiff's facial attack on the constitutionality of the statute, and Plaintiff's claim fails on the merits even if it is not barred by the claim preclusion doctrine.

**BY THE COURT:**

**s/ Michael M. Baylson** \_\_\_\_\_

**Michael M. Baylson, U.S.D.J.**