

*Gillock v. Package It Systems*

*(October 12, 2004)*

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

*Douglas Gillock*

*Opinion No. 46-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*Package It Systems*

*For: Michael S. Bertrand  
Commissioner*

*State File No. K-07480*

**APPEARANCES:**

*Ronald A. Fox, Esq., for the Claimant  
Stephen D. Ellis, Esq., and Wesley M. Lawrence, Esq., for the  
Defendant*

**RULING ON DEFENSE MOTION FOR SUMMARY JUDGMENT**

*The defense moves pursuant to V.R.C.P. 56(b) and WC Rule 8 for judgment as a matter of law in this action for permanent total disability benefits. It argues that the Department's unappealed decision barring claimant from reinstating vocational rehabilitation benefits also bars this claim.*

*The undisputed facts are as follows. Before his work-related injury to his left leg on October 8, 1996, claimant had a pre-existing condition known as Tourette's syndrome, which was an impediment to his finding work. After the injury, he worked at Geographical Data Technology (GDT) from January 1999 until March 2003 in a job where considerable accommodations were made. That job was phased out in 2003 and claimant has not worked since. In Opinion No. 57-03WC (December 31, 2003) (Gillock I), this Department denied claimant's request to reopen vocational rehabilitation, holding he had waived the right to reopen that aspect of the claim and stating, "had his job not been eliminated, he would still be working there." ¶ 7 Gillock I is final, having not been appealed.*

*Next, on April 6, 2004 claimant filed a Form 6 Request for Hearing, seeking permanent total disability benefits.*

*The defense argues that claimant's four-year return to work, lack of causal relationship between the loss of his job at GDT and the 1996 injury and this Department's conclusion on the vocational rehabilitation issue is conclusive on the permanent total disability (PTD) issue, barring the instant action and entitling Package It Systems to judgment as a matter of law.*

*The parties agree that Workers' Compensation Rule 8 integrates the Vermont Rules of Civil Procedure into the WC process and renders those rules applicable to workers' compensation hearing, including V.R.C.P. 56 (c), an action for summary judgment. Therefore, where there is no dispute of material facts and a party is entitled to judgment as a matter of law, summary judgment is appropriate. Id; White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28 (1999).*

*Because claimant returned to work, albeit with accommodations, following his injury and failed in his attempt to resume VR benefits after he was laid off, the defense argues he cannot prove that he is permanently and totally disabled. Indeed, a determination that one is not capable of regular, gainful employment is crucial to a finding of PTD. See Dagesse v. Ethan Allen, Op. No. 20-04WC (2004); Rider v. Orange East Supervisory Union, Op. No. 14-03 (2003). The question then is whether Gillock I is binding on the pending PTD claim, which requires a conclusion that claimant is incapable of regular, gainful employment. The defense contends that it is.*

*Specifically, the defense contends that collateral estoppel bars this claim. "This doctrine serves to protect the courts and parties against the burden of relitigation, encourages reliance on judicial decisions, prevents vexatious litigation and decreases the chances of inconsistent adjudication." Berlin Convalsecent Ctr., Inc. v. Stoneman, 159 Vt. 53, 57 (1992) citing Fitzgerald v. Fitzgerald, 144 Vt. 549, 552 (1984). See also Sheehan v. Dept. Employment and Training, 169 Vt. 304, 308 (1999) (Doctrine of collateral estoppel applies to administrative agencies when acting in judicial capacity.)*

*As the Vermont Supreme Court explained:*

*Issue preclusion is appropriate when the following elements are met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as that raised in the later action; (4) there was a full and fair opportunity to*

*litigate the issue in the earlier action; and (5)  
applying preclusion in the later action is fair.*  
*Stevens v. Stearns* 2003 VT 74 ¶ 13 citing *Berlin Convalescent Ctr., Inc.*, 159 Vt. at 56-57.

*In reaching a decision on collateral estoppel, this Department must "balance our 'desire not to deprive a litigant of an adequate day in court' against a 'desire to prevent repetitious litigation of what is essentially the same dispute.'" Berlin Convalescent Ctr., Inc.*, 159 Vt. at 60, (quoting *Restatement (Second) of Judgments* § 27 cmt. c. (1982)).

*The defense relies on Martelli v. Anaconda Deer Lodge Count 852 P2d. 579 (Mont. 1993) where a claimant sustained a work-related injury and received vocational rehabilitation benefits with the identification of eight full-time occupations suited to claimant claimant's skills and educational level, none of which the claimant pursued. The Montana WC Board issued a final ruling that appropriate option was for claimant to return to work, a ruling that claimant did not appeal. In a later action for PTD the Board held, and the Supreme Court of Montana affirmed, that collateral estoppel barred the claim because the issue whether claimant could return to work had been resolved in the earlier decision. The Martelli decision, however, is not binding on this Department and has limited persuasive effect, based as it is in a different statutory scheme.*

*In the instant case, it is clear that claimant was a party in the previous action and received a final judgment. However, the issue to be decided in the PTD action is much broader than the issue of waiver decided when his claim for resumption of VR benefits was denied. Claimant now argues that his failure to find employment due to his work-related injury and preexisting condition since losing his job supports his assertion that there is no regular employment in a stable market that he can successfully perform, a claim he seeks to prove at hearing. These allegations require considerations of facts not at issue in Gillock I.*

*Because the issues in Gillock I and the present case are different, defendant is unable to meet the requirements for collateral estoppel. Fairness requires that claimant be given the opportunity to prove his allegations.*

*Therefore, the defense motion for summary judgment is DENIED.*

*Dated at Montpelier, Vermont this 12<sup>th</sup> day of October 2004.*

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*Michael S. Bertrand  
Commissioner*