

1-1-1969

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Recommended Citation

David E. Manch, *Administrative Law—Collateral Estoppel—Adverse Findings on Issues in Negligence Action Do Not Preclude Plaintiff from Relitigating Identical Issues in Subsequent Longshoreman's and Harbor Workers' Act Proceeding.*, 18 Buff. L. Rev. 321 (1969).

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RECENT CASES

ADMINISTRATIVE LAW—COLLATERAL ESTOPPEL—ADVERSE FINDINGS ON ISSUES IN NEGLIGENCE ACTION DO NOT PRECLUDE PLAINTIFF FROM RELITIGATING IDENTICAL ISSUES IN SUBSEQUENT LONGSHOREMEN'S AND HARBOR WORKERS' ACT PROCEEDING.

In 1962 Paul Tugwell, a longshoreman, instituted a negligence suit in a federal district court seeking damages for a back injury he allegedly sustained while working on a ship owned by the defendant, Klaveness & Co. The ship-owner impleaded Tugwell's employer, Young & Co., as a third-party defendant. Klaveness and Co. defended by denying that the injury had occurred at the time and place in question.¹ The jury, in answer to a special interrogatory,² found that no injury had occurred on the date in question. After having lost his civil suit, Tugwell instituted workmen's compensation proceedings against his employer under the Longshoremen's and Harbor Workers' Act.³ Young & Co. moved to dismiss the claim, arguing that the doctrine of collateral estoppel should be invoked to prohibit the litigation of an issue which had already been decided in a previous adversary proceeding. The Company argued that the jury's finding that no injury had occurred on the date in question should estop Tugwell from attempting to collect for the same alleged injury in the compensation proceeding. The Commissioner refused to apply collateral estoppel, and found that Tugwell had sustained a compensable injury on the alleged date. In Young & Co.'s present suit charging the Commissioner with error in his failure to apply collateral estoppel, the district court affirmed the Commissioner's award.⁴ In agreeing with the district court, the court of appeals *held* that the substantial variance in the standard of proof required to establish facts before the Commissioner and the jury precluded the application of collateral estoppel, even though the issue decided in the two actions was identical. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968).

The difference in the standard of proof in a subsequent proceeding has, in limited factual contexts, been considered a sufficient reason for not applying collateral estoppel. Prior to the instant case, the usual situation where a variance in the standard of proof has stood as a bar to collateral estoppel has been where a defendant acquitted in a criminal action has sought to employ the doctrine to preclude relitigation of an identical issue in a later civil action or administrative proceeding. *Helvering v. Mitchell*,⁵ cited by the court in the

1. *Tugwell v. A. F. Klaveness & Co.*, 320 F.2d 866, 868 (5th Cir. 1963), *cert. denied*, 376 U.S. 951 (1964).

2. The exact wording of the interrogatory was: "Did Plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S Pleasantville during the early morning hours of July 12, 1958?" *Id.* at 868 note 1.

3. 33 U. S. C. § 901 *et. seq.* (1964).

4. *Young & Co. v. Shea*, No. 65-H-760 (S.D. Tex., filed Sept. 16, 1966).

5. 303 U. S. 391 (1937).

instant case,⁶ clearly illustrates the effect a variance in the standard of proof may have on the application of the doctrine. In this case, the defendant, Mitchell, was first indicted for "fraudulently attempt[ing] to . . . evade . . . [the] income tax."⁷ The defendant was tried and acquitted on this charge. Subsequently, an administrative hearing was held before the Commissioner of Internal Revenue to determine whether the defendant had fraudulently deducted over two million dollars from his gross income. The defendant argued that the question of fraud, which was necessary to the determination in both proceedings, had already been resolved in his favor as was shown by the result in the criminal trial. Therefore, he argued, collateral estoppel should preclude relitigation of this issue in the tax proceeding. The Commissioner did not agree, however, and levied a penalty⁸ on the defendant. The Commissioner's decision was affirmed by the court of appeals and the Supreme Court, which held:

The difference in the degree of the burden of proof in criminal and civil cases precludes application of the doctrine of [collateral estoppel].⁹ The acquittal was "merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused."¹⁰

In the tax proceeding only a preponderance of the evidence was required to find the defendant guilty of fraud. A preponderance of the evidence may have shown the defendant guilty in the criminal action, but this was not enough evidence to secure a conviction in a proceeding where guilt had to be proved beyond a reasonable doubt. From the reasoning in the *Mitchell* case, the logical limit of the difference-in-standard-of-proof exception to collateral estoppel can be ascertained. Only when the criminal action results in an acquittal, will collateral estoppel not be applied.¹¹ Clearly, if the defendant were found guilty beyond a reasonable doubt, the same facts would show him guilty by a preponderance of the evidence.

Although a variance in the standard of proof between criminal actions and administrative proceedings has served as the basis for decisions not to apply collateral estoppel, the same is not true of differences in the standard of proof between civil actions and administrative proceedings.¹² In a few decisions which

6. *Young & Co. v. Shea*, 397 F.2d at 189.

7. 303 U. S. at 396.

8. The penalty is considered "remedial" not punitive, so the question of double jeopardy does not arise. *Id.* at 404.

9. The Court uses the term *res judicata*, not collateral estoppel. Courts frequently use this broader expression instead of the more precise term, even where the causes of action in the two proceedings are different. Here, the criminal action and the tax proceeding are different causes of action. In order to avoid confusion, the proper name for the doctrine has been inserted.

10. 303 U.S. at 397, citing *Lewis v. Frick*, 233 U.S. 291, 302 (1913).

11. See *Amos v. Commissioner*, 360 F.2d 358 (4th Cir. 1965).

12. There is one recently decided case, however, *Strachan Shipping Co. v. Shea*, 276 F. Supp. 610 (S.D. Tex. 1967), which has relied on a difference in the standard of proof between civil actions and administrative proceedings in order to find collateral estoppel inapplicable. This case is presently on appeal in the Fifth Circuit Court of Appeals, and presumably it will be decided in accordance with the decision in the instant case.

have discussed the effect a prior court finding should have in a later administrative proceeding,¹³ the courts have almost always decided that the finding should have the same effect it would have in later judicial proceeding.¹⁴ In none of the cases did the court discuss any possible difference in the standard of proof in the two proceedings which would affect the application of collateral estoppel.

In all likelihood, the reason for the failure of the courts to recognize any difference in the standard of proof between administrative proceedings and civil actions stems from a belief that no such difference exists. Most federal administrative hearings are held under rules established by the Administrative Procedure Act.¹⁵ The A.P.A. prescribes a standard of proof which is necessary to sustain a claim in a hearing conducted under the Act. The standard applies except in hearings where the statute under which the agency operates provides otherwise.¹⁶ This general standard is expressed as follows:

A sanction may not be imposed or a rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.¹⁷

Although this section does not, on its face, provide that a finding must be based on a preponderance of the evidence as in a civil action, the relevant legislative history of the section seems to indicate that a test similar to a preponderance of the evidence was intended. The House Judiciary Committee explained the test in these words:

Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs deduced.¹⁸

Courts have probably been correct in not construing the A.P.A. as establishing a different standard of proof in administrative proceedings held pursuant to the Act, but as mentioned above, the A.P.A. only applies when the statute under which the agency operates does not provide otherwise. The instant case arises

13. The court in the instant case discovered only five decisions discussing the problem. *Young & Co. v. Shea*, 397 F.2d at 188 note 1. An independent investigation has produced only one more. See *Dixie Sand & Gravel Corp. v. Holland*, 255 F.2d 304 (6th Cir. 1958). (Collateral estoppel not applied because of the court's failure to identify its grounds for decision).

14. 2 K. Davis, *Administrative Law Treatise*, § 18.11 (1958). There is at least one exception to this general trend. Where the statute under which the agency operates has been interpreted as requiring that the agency be given a "first crack" at resolving a particular issue, collateral estoppel will not apply. See *N.L.R.B. v. Denver Building Trades Council*, 341 U.S. 675 (1950), *rev'g on other grounds Denver Building Trades Council v. N.L.R.B.*, 186 F.2d (D.C. Cir. 1950). (A court determination that a labor controversy does not involve interstate commerce is not binding on the N.L.R.B. in a subsequent proceeding).

15. 5 U.S.C. § 551 *et. seq.* (1964). [Hereinafter referred to as A.P.A.].

16. 5 U.S.C. § 556(d) (1964).

17. *Id.*

18. Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong. 270 (1944-46).

under the Longshoremen's and Harbor Workers' Act. Therefore, it is necessary to determine whether this Statute establishes a different standard of proof which might affect the applicability of collateral estoppel in proceedings held pursuant to it.

There exist at least two distinctions in the standard of proof applicable to claims under the Longshoremen's Act. The first distinction results from a specific provision of the Act, while the second stems from some courts' view of the general construction of the Act. As for the statutory provision, section 920(a) provides that

[i]n any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim comes within the provisions of this chapter.¹⁹

The effect of this statutory presumption is to shift the burden of going forward with the evidence to the employer,²⁰ and relieve the claimant from having to prove the facts he would otherwise have to show in order to establish a prima facie case. Since certain facts are assumed without proof, a difference in the standard of proof arises when the administrative proceeding is compared to a civil action. In a civil action, if the plaintiff did not prove the facts sufficient to establish a prima facie case, a verdict against him would be granted. In the Longshoremen's Act proceeding, however, the claimant might still win even if he failed to establish a prima facie case, provided the employer did not affirmatively disprove his claim.

It can easily be seen how the statutory presumption could affect the application of collateral estoppel. The civil court judgment against the employee might merely be the result of a finding that because of the presumption he did not submit sufficient evidence to establish a prima facie case. As explained above, this finding would not preclude a compensation award. Therefore, unless the trial court record clearly shows that the plaintiff lost because the employer sufficiently disproved his claim, rather than because the plaintiff was unable to establish a prima facie case, collateral estoppel should not apply. The rules of the different forums give rise to differences in the standard of proof which render collateral estoppel inapplicable.

Aside from the statutory presumption, some courts, particularly those in the District of Columbia,²¹ have developed an independent doctrine that could lead to the conclusion that the standard of proof in civil actions and Longshoremen's Act proceedings is different. The emergence of this doctrine can be traced to *Fidelity & Casualty Co. v. Burris*,²² decided in 1932, just a few

19. 33 U.S.C. § 920(a) (1964).

20. See *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *General Accident Fire & Life Assurance Corp. v. Donovan*, 251 F.2d 915 (D.C. Cir. 1958). But see *Nardi v. Willard*, 156 F. Supp. 425 (S.D.N.Y. 1957).

21. See the cases cited in *Young & Co. v. Shea*, 397 F.2d at 188. Only one of these cases was litigated in the Fifth Circuit.

22. 59 F.2d 1042 (D.C. Cir. 1932).

years after the Act's passage. In this case the Commissioner denied appellant's claim for compensation because "it was not proven that the heat stroke from which decedent died arose out of and in the course of employment."²³ The court reversed the Commissioner's decision without mention of the statutory presumption. In doing so, the court explained its reason for reversal in the following manner:

The purpose of all compensation laws is to provide money indemnity in the case of injury where there is no assignable fault. Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owed by society to an injured employee to secure him protection. . . . *Where there is doubt, it should be resolved in favor of the injured employee or his dependent family.*²⁴ (Emphasis added.)

Although there appears to be no reason why the statutory presumption could not have been used to reach the same result in the *Burris* case,²⁵ the court's reasoning is clear. Once it is established that the injury occurred in the employment setting, any other doubts as to whether the injury was caused by a risk associated with the employment relationship should be resolved in favor of the injured employee. The philosophy of the court seems to be that the employer is covered by insurance, while the employee may not be. Therefore, if mistakes are made, it is best that the burden of the error fall on the employer who has less to lose.²⁶ Other cases which have adopted the *Burris* court's interpretation of the Statute that doubtful questions be resolved in favor of the injured employee, have involved questions similar to the one in the *Burris* case. Most typically, the doctrine has been invoked when competent expert testimony conflicts on complex medical questions. With the Commissioner unable to resolve the issue by finding that one presentation is more correct than the other, the question has been resolved in favor of the injured employee.²⁷ It is significant to note that although the "doubtful questions rule"—as the principle in the *Burris* case may be referred to—has evolved separately from the statutory presumption, its operation appears to be substantially similar. Cases can be found where the presumption and the rule are both mentioned, with no attempt to distinguish the two.²⁸

The effect that application of the "doubtful questions rule" would have on collateral estoppel is similar to the effect of the presumption as can be seen by examining the result in the instant case. Before this result is examined, however, it is first necessary to mention some of the preliminary issues with which the

23. *Id.* at 1043.

24. *Id.* at 1044.

25. Perhaps the parties did not bring the presumption into the argument presented before the court.

26. See *F. H. McGraw & Co. v. Lowe*, 145 F.2d 886,888. (2d Cir. 1944).

27. See, e.g., *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967) ("Doubtful questions rule" applied to question of whether myocardial infarct was a consequence of an employment related accident).

28. *Id.*

court was forced to deal. First, in his argument that collateral estoppel did not apply, the Commissioner maintained there was no identity of issues in the two proceedings as would be necessary for the imposition of collateral estoppel, because the civil action was based on negligence, whereas the compensation remedy was a form of insurance.²⁹ The court reasoned in answering this contention that in order for collateral estoppel to apply "it was only necessary to show that the same fact question was clearly decided in the prior suit . . . and that the issue was material to . . . [the suit's] . . . determination."³⁰ The special interrogatory employed in the court action was intended to answer the question of whether the injury had occurred when alleged. Since occurrence of the injury at the place and time in question was the precise issue which had to be proved at the compensation proceeding, the court had no problem in finding an identity of issues in the two actions. Since there was no claim that any other element necessary for collateral estoppel was lacking,³¹ the court next considered whether any special features of the administrative proceeding existed which would prohibit the application of the doctrine.

In comparing civil actions and Longshoremen's Act proceedings, the court first noted that the Commissioner was not bound by the common law rules of evidence. The court termed the proceedings before the Commissioner as, therefore, more "free-wheeling."³² The Commissioner could accept hearsay evidence and other documents which would be inadmissible in a court of law.

The court found of even greater significance, however, that in proceedings under the Longshoremen's Act "in considering the proof offered by the parties, the Commissioner operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee."³³ This paramount difference between the court and administrative proceeding led to the court's conclusion that "a substantial variance in the burden of proof"³⁴ existed in the two proceedings and that a substantial variance of this nature "ha[d] precluded application of collateral estoppel in other situations."³⁵ The court buttressed its analysis by making an analogy to the degree-of-proof exception to collateral estoppel in criminal and civil proceedings.³⁶ Since a criminal acquittal would not bar an action by the same plaintiff in a subsequent civil proceeding because

29. *Young & Co. v. Shea*, 397 F.2d at 187.

30. *Id.*, citing *Tomlinson v. Lefkowitz*, 334 F.2d 262,264 (5th Cir. 1964); *Hyman v. Regenstein*, 258 F.2d 502, 510 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1958).

31. The court did not consider whether the proper parties for collateral estoppel were present, although the district court decision had been based on a finding that the parties to the present suit were not adverse parties in the previous court action. *Young & Co. v. Shea*, No. 65-H-760 (S.D. Tex., filed Sept. 16, 1966). The fact that the court did not discuss this lower court holding is not surprising. Both parties probably realized the decision was in error. A third-party defendant and the plaintiff certainly are adverse parties, since if the plaintiff wins, the third-party defendant might be liable to the defendant. *See* FED. R. CIV. P. 14(a).

32. *Young & Co. v. Shea*, 397 F.2d at 188.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 189.

the degree of proof necessary for a judgment was less in the civil case, a verdict for the defendant in a civil action should not bar a plaintiff's claim in a subsequent administrative proceeding where the degree of proof was less.³⁷ This analogy served as the stepping-stone to the court's conclusion:

[S]ince we are persuaded that the applicable legal rules enable a claimant to establish the existence of an actionable injury before the Commissioner more easily than in a civil tort action, . . . on the facts of this case the doctrine of collateral estoppel is inapplicable.³⁸

The court in the instant case, relying heavily on the "doubtful questions rule" as establishing a different standard of proof for the administrative proceeding, found that collateral estoppel was inapplicable. The court did not consider, however, whether the "doubtful questions rule" has applied, or should apply, to the particular type of issue involved in the case. The Fifth Circuit Court of Appeals decision in the original negligence action helps to cast light on the exact issue involved in the present proceeding.³⁹ A reading of that opinion clearly shows the court's belief that Tugwell lost simply because the jury did not believe his story that the injury occurred while he was working on the ship.⁴⁰ The issue involved was one of credibility: Tugwell claimed he slipped and fell, while the shipowner attempted to show that Tugwell had sustained the injury somewhere else at another time.⁴¹ At the administrative hearing, the Commissioner was faced with having to resolve the same issue. The court, by deciding that the "doubtful questions rule" applies to the Commissioner's decision, in effect holds that the "doubtful questions rule" applies to the issue of the claimant's own credibility. It is interesting to speculate whether the court meant to reach this result. The "doubtful questions rule" has never before been applied in cases where the claimant's credibility has been the critical factor. As already mentioned, the usual situation for the invocation of the rule has been where competent medical testimony conflicts on complex issues.⁴² In such situations, the question is not whether the experts are telling the truth, but rather which presentation is more correct. Perhaps the court should have discussed whether the rule should extend to this new situation. The court accepted the fact that the presumption did not apply to the issue of the claimant's credibility,⁴³ but no reason is offered as to why the "doubtful questions rule" should then apply. It is one thing to imply—as did the court in the *Burris* case—that when an injury is indisputably shown to have happened on the job, the employee should have the benefit of the doubt with regard to whether the

37. *Id.*

38. *Id.*

39. See *Tugwell v. A.F. Klaveness & Co.*, 320 F.2d 866 (5th Cir. 1963), *cert denied*, 376 U.S. 951 (1964).

40. *Id.* at 868.

41. *Id.*

42. See *supra* note 28 and accompanying text.

43. *Young & Co. v. Shea*, 397 F.2d at 188, *citing* *Sykes v. O'Hearne*, 181 F. Supp. 368, 371 (D. Md. 1960).

injury is sufficiently related to a risk arising out of the employment.⁴⁴ It is quite another thing to hold that the employee should have the same benefit when the issue is whether to believe him in his claim that the injury occurred while he was at work.

Rather than relying on the "doubtful questions rule" and expanding the rule to encompass the claimant's credibility, the court could have rested its holding on a different ground. The court noted that the proceedings before the Commissioner were more "free-wheeling" and that the Commissioner was not bound by the common law rules of evidence.⁴⁵ This fact alone might have a crucial impact on whether collateral estoppel ought to be applicable to the administrative proceeding. Suppose, for example, that although the jury did not believe Tugwell's evidence, his story could have been corroborated by hearsay or other evidence which would have been inadmissible in a court of law. The administrator would be able to give such testimony its probative weight, and with fair weight given to this testimony, Tugwell's credibility might have been shored up enough to convince the Commissioner the story was true. Therefore, under the rules applicable to the administrative proceeding, Tugwell might have won. Thus, the court could have held that collateral estoppel should not apply where the differences in the rules of evidence in the two forums create a strong possibility of a different result. The situation is analogous to cases where a change in substantive law has occurred between the first and second proceeding in the same forum. In such cases collateral estoppel has been held to be inappropriate,⁴⁶ and there is no apparent reason why collateral estoppel could not be held to be inappropriate in the instant case for similar reasons. Fairness would appear to require that the claimant be allowed to take advantage of the less strict rules where a significantly different result might occur in the administrative proceeding.

Regardless of the grounds for the holding, the instant case may prove important in the administration of the Longshoremen's and Harbor Workers' Act. Negligence actions against shipowners with employers as third-party defendants occur with some frequency, since the Act expressly allows the employee to sue the shipowner without regard to a compensation claim being filed against the employer.⁴⁷ As a result of the instant case, an employer will not automatically be free from workmen's compensation liability if the employee loses the negligence action, even if the employer has the foresight to set the stage for collateral estoppel by asking the jury to answer a special interrogatory involving the occurrence of the injury.

On the other hand, it must be remembered that the "doubtful questions rule," on which the court relied so heavily, is a peculiarity of the Act as in-

44. 59 F.2d 1042, 1044.

45. *Young & Co. v. Shea*, 397 F.2d at 188.

46. *See, e.g., Commissioner v. Sunnen*, 333 U.S. 591 (1948).

47. 33 U.S.C. § 933 (1964).

terpreted by some courts only.⁴⁸ It remains to be seen whether other courts, who have not relied on the "doubtful questions rule," will follow the result in *Young & Co.* Without the adoption of the "doubtful questions rule" it may seem unlikely that the decision will be followed. Courts could follow the instant case, however, by holding that the statutory presumption, rather than the "doubtful questions rule," creates a different standard of proof which precludes application of the doctrine.⁴⁹ In the instant case the court did not consider whether the presumption would give rise to a different standard of proof, because the court decided that the presumption did not apply to the particular question involved.⁵⁰ Other courts might hold that the presumption did apply to the particular question involved, and it would be possible to use the presumption as the basis for a decision not to apply collateral estoppel because of a difference in the standard of proof.

The court's short discussion of the relaxed rules of evidence in the administrative proceeding as a possible factor in its decision not to apply collateral estoppel, may prove to be of more general significance in administrative law than the discussion of the difference in standard of proof arising from the purpose and provisions of the Longshoremen's Act. All administrative agencies operate under relaxed rules of evidence.⁵¹ In future cases involving other agencies, it may be argued that the difference in the rules of evidence alone is a sufficient reason not to apply collateral estoppel. Although the instant case does not hold that the difference in the rules of evidence would be a sufficient reason not to apply the doctrine, this possibility is in no way precluded by the court's opinion. In any event, the instant case indicates that in the future the applicability of collateral estoppel to administrative proceedings may depend to a greater extent than has previously been recognized in the past, on the particular function and rules of each agency. In this respect, *Young & Co. v. Shea* may well be regarded as the basis for a new approach to the question of the effect to be given prior court judgments in subsequent administrative proceedings.

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48. See *supra* note 21 and accompanying text.

49. See *supra* notes 19 and 20 and accompanying text.

50. *Young & Co. v. Shea*, 397 F.2d at 188.

51. E.g., Administrative Procedure Act, 5 U.S.C. § 556 (d) (1966).