

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEBORAH CRUMLISH,

Plaintiff and Appellant,

v.

THE BOARD OF ADMINISTRATION OF
THE SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM,

Defendant and Respondent.

D058955

(Super. Ct. No. 37-2009-00093989-
CU-PT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Yuri Hofmann and Lisa A. Foster, Judges. Affirmed.

This appeal presents the question of whether a public employer's pension system is collaterally estopped to deny an employee an industrial disability pension after the employer has agreed a certain injury is work related for purposes of workers' compensation benefits. We conclude that under established law, collateral estoppel is inapplicable. We also conclude the pension system had no burden to prove the employer could accommodate another injury of the employee, because she unequivocally testified

that the injury was not a ground of her disability claim. We find the plaintiff's remaining contentions unpersuasive as well, and thus we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995 the City of San Diego (the City) Fire Department hired Deborah Crumlish as a 911 dispatcher. In August 1999 she reduced her hours to parttime. In January 2001 she complained that her job duties caused neck, back and upper extremity pain, which had gotten progressively worse over the previous year. The City placed Crumlish on industrial leave in the fall of 2001 and she did not return to work.

Crumlish received various treatments over several years, including bilateral carpal tunnel surgeries, epidural injections to the cervical spine, cervical spine surgery, and epidural injections to the lumbar spine. Additionally, she contracted hepatitis C from a lumbar spine injection with a contaminated vial. She underwent approximately one year of chemotherapy for the hepatitis C, and she claimed the chemotherapy caused mental impairments such as loss of memory, anxiety, and depression.

During treatment, Crumlish received workers' compensation benefits for temporary total disability. In December 2007 after her conditions were deemed permanent and stationary, the Workers' Compensation Appeals Board (WCAB) entered a stipulated award to her for a 64 percent permanent disability. The City accepted responsibility for all of her conditions for purposes of workers' compensation.

In 2004 Crumlish had applied to the San Diego City Employees' Retirement System (SDCERS) for an industrial disability pension. She claimed the following injuries: bilateral carpal tunnel syndrome caused by repetitive typing, injuries to her

cervical spine and lumbar spine caused by repetitive turning of her neck to answer phones and monitor several computer screens, and hepatitis C contracted during treatment. She later added memory problems caused by treatment for hepatitis C.

SDCERS' Board of Administration (the Board) referred the matter to an adjudicator, and the Honorable Kevin Midlam, a retired superior court judge, was selected. In September 2008 he held an administrative hearing. Crumlish represented herself. Before the hearing, SDCERS provided its proposed exhibits to Crumlish, and at a prehearing conference she conceded she reviewed them.

The administrative record contains numerous medical reports pertaining to Crumlish's conditions. Her various medical providers and examiners agreed her cervical spine injury is work related. In April 2006 her primary treating physician, Stephen Munday, reported that Crumlish advised him her cervical spine was essentially pain free.

Opinions conflicted on whether Crumlish's lumbar spine injury was work related. In 2001 her original primary treating physician, David Smith, M.D., reported there "is no question" as to industrial causation. Dr. Smith, however, was "uncertain as to the exact diagnosis" and he requested authorization for an MRI. A 2001 MRI was essentially negative, with a slight narrowing of the L4-5 disc.¹

Pierre Hendricks, M.D., a board certified orthopedic surgeon, evaluated Crumlish in 2004 for purposes of workers' compensation. His report states: "The patient has mild

¹ Crumlish quit seeing Dr. Smith after she contracted hepatitis C from an epidural injection he gave her with a contaminated vial. The administrative record contains an unsigned copy of a malpractice complaint against him.

degenerative lumbar disc disease and spondylosis based on the lumbar spine MRI of May 13, 2003. This condition is not considered to be causally related to the patient's employment. This conclusion is based on the fact that her job required prolonged sitting but no other activity which might be considered injurious to the lumbar spine. Prolonged sitting did not cause a lumbar spine injury since a review of the medical literature finds no causal relationship between prolonged sitting and lumbar spine injuries."

(Fn. omitted.) Dr. Hendricks attributed 100 percent of the lumbar spine condition "to nonindustrial causation." A radiology examination of Crumlish's lumbar spine in December 2004 showed "[m]ild degenerative disc disease."

In 2007 SDCERS retained A. Lyle Rosenfield, M.D., an orthopedist, to evaluate Crumlish. Based on her history, her medical records, and a physical examination, Dr. Rosenfield found as follows: Crumlish's carpal tunnel problems were resolved. Her industrial cervical spine injury did not preclude her from performing her job duties *if* certain accommodations were made. She should not be subjected to a "fixed head gaze for an extended period of time [or] repetitive movement." Without the accommodations, she would be permanently incapacitated from performing her job duties.

Dr. Rosenfield believed Crumlish's lumbar spine injury did not prevent her from performing her job duties, because her job description included the accommodation that she may alternate at will between sitting and standing positions. In any event, he determined "the majority of her findings and symptoms as they relate to the lumbar spine are not a result of her employment as a dispatcher," and instead are attributable to "an ongoing degenerative process." His report explains, "I base this on the fact that there is

no specific mechanism of injury that would have caused progressive degenerative changes to her back based on her job description. Sitting for extended periods of time is not a clear mechanism that can result in progressive degenerative changes of the lumbar spine."

Tami Auerback, D.C., also evaluated Crumlish in 2007 for purposes of workers' compensation. She disagreed with Dr. Hendricks's assessment. Dr. Auerback believed that "100% of Ms. Crumlish's disability is caused by and apportioned to industrial causes."

Crumlish, however, did not argue her cervical spine or lumbar spine conditions precluded her from performing her usual job duties. She did not refer to any of the medical evidence on those conditions. Rather, she unequivocally testified her claim was based *solely* on memory loss caused by treatment for hepatitis C. The following exchange took place between Judge Midlam and Crumlish:

"HON. MIDLAM: As I understand it, Ms. Crumlish, there are two factors to your claim. It started out with a bilateral carpal tunnel syndrome problem and a low back problem. The carpal tunnel syndromes were treated by surgical release and you had surgery to your back. As a result of the treatment for those two conditions, the hepatitis C was introduced into your system.^[2] [¶] In reviewing the documents that were provided to me, it appears that from a medical point of view at least, insofar as one doctor, Dr. [Rosenfield] is concerned that your conditions are resolved as they relate to your wrists and your back.

² The administrative record shows Crumlish's surgery was to her cervical spine, and treatment of her lumbar spine caused the hepatitis C.

"Now, what is your position with regard to that? Do you feel that your wrist and your back deprive you of the ability to continue to do your work as a dispatcher?"

"MS. CRUMLISH: My—no, my wrists are okay. My back, I'm still receiving epidural injections for, through workman's comp.

"HON. MIDLAM: All right.

"MS. CRUMLISH: I had—my latest one was a month ago with doctor— well, Dr. Hall is my primary doctor for it, but another doctor did the injections.

"HON. MIDLAM: Is the back the basis for your claim, any basis for your claim for disability retirement?"

"MS. CRUMLISH: No."

The following exchange then took place between SDCERS' attorney and Crumlish:

"Q. Ms. Crumlish, is your disability claim also based upon a cervical injury, a neck injury?"

"A. Is my retirement claim or my workman's comp?"

"Q. Your retirement claim.

"A. No.

"Q. So your disability retirement claim is . . . solely on the memory loss?"

"A. Correct. Memory loss and—I don't know how to describe this. It's—sometimes I can recall things, but it's not immediate like I could before the treatment, which is necessary for 911 call taking."

Crumlish's testimony pertained only to her mental condition. Judge Midlam commented to her, "It is clear from both the medical records and from your testimony

that but for the injection of the chemicals that caused you to get hepatitis C, you'd be back there doing your job." She responded, "Yes, sir."³

Likewise, the testimony of Crumlish's other witness, Susan Infantino, her supervisor at the 911 dispatch center, pertained only to Crumlish's memory loss. Infantino testified that about two years earlier the City mistakenly sent Crumlish a letter calling her back to work. Crumlish went to Infantino's office and "seemed confused." Crumlish asked the same questions several times, Infantino had to repeat information for Crumlish, and Crumlish had to write down everything Infantino told her and repeat it to Infantino. Infantino testified Crumlish was not the person "I was used to when she was a dispatcher for me," and Crumlish "had to call me back later to confirm what I had said and so it was definitely a different person." Infantino also testified, "I really felt like this is not a person that could do the job that we do because it's important to remember without writing anything down what the caller is telling you." Infantino did not believe Crumlish "could even pass the . . . basic test that someone would have to take to become a dispatcher."

Judge Midlam took the matter under submission and later issued his "Proposed Findings of Fact and Law, and Recommendation" (recommendation). He recommended the denial of an industrial disability pension. He explained: "Here, the facts are that the

³ Dr. Rosenfield's report states that when he examined Crumlish in 2007 she complained of occasional stiffness of her neck and constant discomfort in her lower back, but she reported that "the main reason she cannot work is secondary to her memory issues." She made "it quite clear that this is her most disturbing issue and this is why she does not feel she can work as a dispatcher."

preponderance of the medical records dealing with the cervical spine and wrist problems find those conditions resolved and [Crumlish] able to work as a 911 [d]ispatcher. [She] confirms this. The preponderance of the evidence also supports the finding that the lumbosacral problem was not the result of injury arising out of or in the course of City employment. As such, nothing relating to this condition would qualify for industrial disability retirement benefit." He added, "Even if the low back condition did qualify, treatment resulting in a condition of cognitive diminution is so attenuated as to not be reasonably foreseeable and would certainly constitute a superseding and intervening cause." Because Judge Midlam found no industrial causation as to the lumbar spine condition, he did not elaborate on the conflicting evidence pertaining to the cause of Crumlish's memory loss.

Crumlish objected to the recommendation. Unlike her position at the hearing, she argued memory loss was not the only ground for her claim. She noted that Dr. Rosenfield's report states she cannot perform her job duties unless her cervical spine condition is accommodated, and indicated she could produce evidence from her employer that the restrictions "are impossible to accommodate," because "as a dispatcher, you are watching between 3 and 6 screens, depending on what rotating assignment you have that day. Your head and neck are constantly moving back and forth with a fixed gaze at the screens for a minimum of 8 hours a day."

Crumlish did not recall seeing Dr. Rosenfield's report before Judge Midlam issued his recommendation. She explained, "I know I told you that I felt my orthopedic issues would not prevent me from doing my job, but I was not aware of the restrictions when I

made that comment. I was so focused on my memory problems that I did not even think about any orthopedic issues."

Judge Midlam treated the matter as a request for reconsideration, and he recommended that the Board deny it. He explained: "The foregoing finding, while based on all of the evidence, is particularly supported by [Crumlish's] own clear and unequivocal testimony at the . . . hearing to the effect that the only basis of that application for industrial disability retirement was her memory loss. But for that loss she could perform all the duties of a 911 [d]ispatcher." The Board did not reconsider the matter, and it adopted Judge Midlam's recommendation for the denial of disability retirement benefits.

Crumlish then retained an attorney and filed a petition for writ of mandate in the superior court (Code Civ. Proc., § 1094.5)⁴ for an order requiring the Board to set aside and correct its ruling, based on issues she raises on appeal. The court denied the petition and entered judgment for the Board.⁵

⁴ Further undesignated statutory references are also to the Code of Civil Procedure unless otherwise specified.

⁵ Judge Hofmann heard the matter and issued a statement of decision. Judge Foster entered the judgment and amended judgment.

DISCUSSION

I

Administrative Mandamus

The administrative mandamus statute applies "[w]here the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (§ 1094.5, subd. (a).) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (§ 1094, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

(Ibid.)

When a fundamental vested right is involved, such as retirement benefits, the trial court must exercise its independent judgment. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.)

"[U]nder the independent judgment rule, the trial court must weigh the evidence and make its own determination as to whether the administrative findings are sustained."

[Citation.] The trial court has " 'the ultimate power of decision' " (*Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655, 659.)

On appeal, a substantial evidence standard of review applies to factual matters. "We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings." (*Yordamlis v. Zolin, supra*, 11 Cal.App.4th at p. 659.) "These rules of appellate review apply even where the evidence in the administrative record is undisputed, if that evidence is 'subject to conflicting inferences with respect to the crucial issue.'" (*Id.* at p. 660.)

II

Cervical Spine Condition: Accommodation

Crumlish contends we must reverse the judgment because SDCERS did not meet its burden of proving the City could accommodate "the minimal work restrictions" Dr. Rosenfield prescribed for her cervical spine condition. We conclude the contention lacks merit.⁶

San Diego is a charter city, and through SDCERS it maintains a pension plan for its employees. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1063 (*Lexin*).) A SDCERS member is eligible for disability retirement if he or she is permanently incapacitated from the performance of duty, the incapacity is the result of injury or

⁶ Crumlish also cites similar reports by other medical professionals regarding accommodation of her cervical spine condition, which we need not address because they do not affect the result.

disease arising out of or in the course of his or her City employment, the incapacity renders retirement necessary, and the incapacity did not arise from a preexisting medical condition or a nervous or mental disorder. (San Diego Mun. Code, § 24.0501, subd. (b).)

In a disability retirement hearing, the applicant has the burden of proving the above criteria by the preponderance of the evidence. (SDCERS Charters, Policies, Resolutions and Rules of the Board of Admin., Rule 7.80(e).) After the applicant has presented his or her evidence, "SDCERS' counsel will present SDCERS' evidence and will have the burden of proof on whether or not the applicant can be accommodated." (*Id.*, Rule 7.80(f).)

Crumlish submits that the "inescapable inference" from the lack of SDCERS' accommodation evidence is that the City cannot accommodate her cervical spine injury, and thus her retirement is necessary. She also complains that Judge Midlam's recommendation does not address accommodation.

The issue of accommodation, however, never arose because Crumlish unequivocally testified her claim was *not* based on her cervical spine condition. Rather, it was based solely on mental impairment caused by treatment for hepatitis C contracted during an epidural injection to her lumbar spine. Crumlish received Dr. Rosenfield's report before the hearing, and she conceded she reviewed it. Thus, she knew or reasonably should have known its contents, including his opinion on accommodation. If she intended to base her claim on her cervical spine condition, she should have said so, and at that point the burden would have been on SDCERS to address accommodation.

Crumlish asserts her cervical spine condition was at issue at the hearing because SDCERS' issue statement prepared in advance of the hearing was based on "orthopedic issues involving her neck, back and hepatitis C." The issue statement is unavailing, however, because under questioning by both Judge Midlam and SDCERS' attorney, Crumlish disavowed that her claim was based on any neck or back problem. SDCERS was not required to defend against a claim she originally made but unambiguously withdrew.

Additionally, Crumlish asserts her cervical spine condition was included in her claim because she "squarely raised the accommodation issue in her request for reconsideration, along with an explanation of why she had not pressed ahead with the issue previously." Crumlish's petition for writ of mandamus, however, does not allege she was improperly denied posthearing relief. An appellant may not ordinarily change his or her theory on appeal because of unfairness to the trial court and opposing party. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 630.) Further, she cites no legal authority suggesting she was entitled to any posthearing relief to disavow her own testimony at the hearing. The appellant has the burden of presenting legal authority on each point made, and the failure to meet the burden constitutes forfeiture. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1207.)

III

Lumbar Spine Condition

A

Collateral Estoppel Effect

Additionally, Crumlish contends the collateral estoppel doctrine precludes SDCERS from litigating causation. She argues that SDCERS is in privity with the City, and thus SDCERS is bound by WCAB's stipulated award, which lists her lumbar spine condition as an industrial injury, as well as the related hepatitis C and memory loss.

"Under the doctrine of res judicata, 'parties [and those in privity with the parties] to a prior proceeding are precluded from relitigating issues determined [or that could have been determined] in the prior proceeding.'" (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 180-181.) Collateral estoppel, or issue preclusion, is one aspect of the res judicata doctrine. Generally, collateral estoppel bars relitigation of an issue decided in a previous proceeding when "(1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

The term "privity" refers to a sufficiently close relationship with a party to justify application of collateral estoppel. (*Martin v. County of Los Angeles* (1996) 51

Cal.App.4th 688, 700.) The privity issue " " requires careful examination into the circumstances of each case as it arises." " " (*Ibid.*)

This court has previously decided a privity issue substantively identical to the issue here. In *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563 (*Bianchi*), the WCAB awarded a police officer partial permanent disability for orthopedic injuries and an " 'intermittent minimal to slight depressive disorder' " arising from an arrest incident. (*Id.* at p. 565.) The officer then applied to the San Diego City Retirement Board of Administration (retirement board) for industrial disability retirement. The retirement board denied his application, finding the orthopedic injuries were work related, but not disabling, and while his mental condition was disabling, it was unrelated to his job. The officer successfully petitioned the superior court for a writ of mandate on the ground the retirement board was collaterally estopped by the WCAB award from denying causation on his mental condition. (*Id.* at p. 566.)

We reversed the judgment, concluding collateral estoppel was inapplicable. Citing the privity factors discussed in *Traub v. Board of Retirement* (1983) 34 Cal.3d 793 (*Traub*), we reasoned in *Bianchi*: "[The *Traub*] factors demonstrate that the [board] here is not in privity with the City. The retirement system is established as an independent entity; all funds for the system are required to be segregated from city funds, placed in a separate trust fund under the exclusive control of the [board], and may only be used for retirement system purposes. (San Diego City Charter [hereafter Charter], art. IX, §§ 141, 145.) The [board] acts as an independent administrator empowered to conduct actuarial studies to determine conclusively the amounts of contributions required of the City and

participating employees. [Charter, art. IX, §§ 142, 143; San Diego Mun. Code §§ 24.0901, 24.0801.] The board has the sole authority to determine the rights to benefits from the system, and to control the administration of and investments for the fund. The [board] has twelve members, the majority of whom are not City officers: three represent active members of the retirement system, one represents retired members of the system, one is an officer of a local bank, and three are independent citizens of the City [Charter, art. IX, § 144].^[7]

"Most significantly, the retirement system is a contributory system, based on actuarial tables established by the [board], with contributions to fund the system paid equally by the *City and its participating employees*. [Charter, art. IX, § 143.] Indeed, the system also encompasses noncity entities and employees. The San Diego Unified Port District, a special entity separate and distinct from the City [citation], and its employees participate in and contribute to the system on an actuarial basis. Thus, . . . any claim for benefits from the retirement system economically impacts not merely the City (the only party impacted by the WCAB award), but also imposes an adverse economic impact on the contributing members of the system (i.e., both City employees and port district employees) as well as the treasury of the port district. Accordingly, while the City's

⁷ Effective April 1, 2005, SDCERS's board consists of 13 members. The mayor appoints seven members, who may not be city employees or SDCERS members and must have professional qualifications; one member is a police safety member of SDCERS; one member is a fire safety member of SDCERS; two general members are elected by active general members of SDCERS; one member is a retired member of SDCERS; and one member is a city management employee in administrative service. (Charter, art. IX, § 144.)

economic interests may have been represented at the WCAB hearing, the economic interests of the retirement system participants were not represented; hence the parties to the WCAB were not identical to or in privity with the parties to the [board] hearings." (*Bianchi, supra*, 214 Cal.App.3d at pp. 571-572, fns. omitted, italics added.)

In *Traub*, the California Supreme Court refused to apply collateral estoppel to a WCAB award entered against the county, in the employee's application for disability retirement based on the same injury. The court reasoned that the retirement board did not act as a mere agent of the county, but instead was an independent administrator of an entity distinct and separate from the county under the County Employees Retirement Law (Gov. Code, § 31450 et seq.). Further, membership in the retirement system was not limited to county employees, but instead included noncounty employees as participants, and the system was funded by governmental employers and employees on an actuarial basis. (*Traub, supra*, 34 Cal.3d at p. 798.) *Traub* observed that the "Courts of Appeal have consistently held that a county retirement board is not bound by adjudication of a workers' compensation claim against the county because the privity requisite to application of collateral estoppel principles does not exist." (*Id.* at pp. 798-799; see also *Preciado v. County of Ventura* (1982) 143 Cal.App.3d 783, 787-789 [retirement board of county not collaterally estopped by finding in prior WCAB proceeding to which county was party]; *Geoghegan v. Retirement Board* (1990) 222 Cal.App.3d 1525, 1533-1534

[retirement board of City and County of San Francisco not collaterally estopped by findings in prior WCAB proceeding to which city and county was a party].)⁸

Crumlish concedes that "[i]f nothing had changed since this Court decided *Bianchi* in 1989, that case would have foreclosed the collateral estoppel argument presented here." She contends *Bianchi* is no longer good law, however, because in 2002 the Charter was amended to insulate non-city public agency participants in SDCERS and their employees from any obligation to contribute to the pensions of city employees. Article IX, section 149 of the Charter provides, "All monies contributed by the [non-city] public agency and its employees . . . shall be placed in the Trust Fund to be held and used only for the purpose of paying benefits and necessary expenses of administration related to the public agency's participation."

The participation of non-city entities and their employees in SDCERS, however, was only one of several factors supporting our holding in *Bianchi*. It remains that the City and SDCERS are separate entities and SDCERS has the exclusive power to

⁸ In *Lexin, supra*, 47 Cal.4th 1050, our high court acknowledged that "[a]lthough established by the City, [SDCERS] is a separate entity." (*Id.* at p. 1063, citing Charter, art. IX, § 144.) The court explained: "The SDCERS Board is a fiduciary charged with administering the City's pension fund in a fashion that preserves its long-term solvency; it must ensure that through actuarially sound contribution rates and prudent investment, principal is conserved, income is generated, and the fund is able to meet its ongoing disbursement obligations. [Citations.] Consistent with that central mission, the SDCERS Board has a range of ancillary obligations, including but not limited to providing for actuarial services, determining member eligibility for and ensuring receipt of benefits, and minimizing employer contributions. [Citations.] To carry out these duties, the Board is granted the power to make such rules and regulations as it deems necessary." (*Lexin, supra*, at p. 1064, citing *Bianchi, supra*, 214 Cal.App.3d at p. 571.)

determine whether a participant is entitled to benefits. (Charter, art. IX, § 144.) It also remains that city employees contribute to the retirement fund, and thus, unlike a WCAB award, a SDCERS award impacts not only the City but also its employees. The interests of city employees are not represented in a WCAB proceeding, and thus there is a lack of privity for purposes of collateral estoppel. (*Bianchi, supra*, 214 Cal.App.3d at p. 571.) We conclude the 2002 amendment to the Charter would not have changed the result in *Bianchi*, and the opinion defeats Crumlish's collateral estoppel argument.⁹

B

Maier Opinion

Further, Crumlish urges that under *Maier v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 (*Maier*), she is entitled to disability retirement benefits for her lumbar spine condition and related injuries even if they are not work related. We conclude *Maier* is inapplicable.

In *Maier*, the petitioner obtained employment at a hospital as a nurse's assistant. By law, prospective employees were required to undergo tuberculosis testing. The

⁹ Crumlish cites *Roccaforte v. City of San Diego* (1979) 89 Cal.App.3d 877, 884, in which this court referred to SDCERS as an "arm of the City." *Roccaforte*, however, does not concern collateral estoppel. Further, Crumlish's reliance on *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, and *French v. Rishell* (1953) 40 Cal.2d 477, on the privity issue is misplaced for reasons discussed in *Bianchi* and *Traub*. (*Bianchi, supra*, 214 Cal.App.3d at pp. 570-571 & fns. 5, 6; *Traub, supra*, 34 Cal.3d at p. 798.) Additionally, given our holding on the privity issue we are not required to address the parties' positions on the identity of issues aspect of collateral estoppel. We note, however, that the "lack of identity of issues is frequently invoked to deny collateral estoppel effect to a prior WCAB ruling in a subsequent retirement board proceeding." (*Bianchi, supra*, at p. 567.)

petitioner's test was positive and the hospital required her to take antituberculosis drugs as a condition of employment. She developed a significant adverse reaction to the drugs, which required hospitalization and a recuperation period. She filed a claim for workers' compensation benefits, and the hospital contested the claim on the ground the injury did not arise out of or in the course of her employment. (*Maier, supra*, 33 Cal.3d at p. 732.)

Following the legislative mandate that workers' compensation law be liberally construed in favor of awarding benefits, the California Supreme Court held that because the hospital required treatment of the preexisting injury as a condition of employment, "[i]t is clear that petitioner's injury was linked in some causal fashion to her employment," and thus, "her injury arose out of and in the course of her employment." (*Maier, supra*, 33 Cal.3d at p. 738.) *Maier* explained "the presence of an industrial injury is not always a prerequisite for compensability where injury results from the medical care which was required by the employer. The rule is well settled that where an employee submits to an inoculation or a vaccination *at the direction of the employer and for the employer's benefit*, any injury resulting from an adverse reaction is compensable under the Workers' Compensation Act." (*Id.* at pp. 734-735.)

Crumlish asserts she "was not exactly at liberty to decline treatment," citing Labor Code section 4056. The statute provides that no *workers' compensation* is payable when a "disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury." (Lab. Code, § 4056.) She also

cites *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, which explains Labor Code section 4056 "merely codifies the common law rule requiring mitigation of damages" (*Reynolds, supra*, at p. 216), and a municipal retirement system "can apply workers' compensation laws by analogy when making a finding of eligibility or noneligibility." (*Id.* at p. 214.)

Crumlish asserts we should extend the holding of *Maier* to the SDCERS proceeding here. To any extent *Maier* is arguably applicable outside the workers' compensation context, however, it is inapplicable here because it is factually distinguishable. Crumlish does not cite the administrative record to show the City directed or required her to obtain treatment of her lumbar spine as a condition of continued employment, that the City would have viewed her refusal of treatment adversely, or that the treatment was at least partially for the City's benefit. (*Maier, supra*, 33 Cal.3d at p. 737.) It is the appellant's burden to provide record references in support of an argument, and the failure to do so constitutes forfeiture of the issue. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 229.) Crumlish merely claims the "City appeared to approve—and perhaps to require—cooperation in that treatment." The causation element of *Maier* is unsatisfied.

IV

Cognitive Impairment: Sufficiency of Findings

Additionally, Crumlish contends the Board erred by adopting Judge Midlam's findings because they do not address or resolve conflicting evidence on whether her cognitive impairment was caused by treatment for hepatitis C or unrelated psychological

factors, on the ground the impairment is not compensable because it was unforeseeable and constitutes a superseding and intervening cause. She asserts the findings do not meet the requirement of section 1094.5 that "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).

In *Topanga*, the Supreme Court addressed a challenge to a county agency's decision to permit a variance. The court held that in adjudicating an application for a variance, the governing administrative agency "must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action." (*Topanga, supra*, 11 Cal.3d at p. 514.)

Judge Midlam's foreseeability finding is an alternative ground for the denial of disability retirement benefits for Crumlish's lumbar spine and related injuries, however, and as such, it is immaterial. The first ground for his recommendation was that the "preponderance of the medical evidence . . . supports the finding that the lumbosacral problem was not the result of injury arising out of or in the course of City employment," and thus "nothing relating to this condition [e.g., hepatitis C or memory loss] would qualify for an industrial disability retirement benefit."

In support, Judge Midlam relied on Dr. Rosenfield's 2007 report that Crumlish's lumbar spine condition is "likely a result of an ongoing degenerative process" rather than industrial. Judge Midlam also relied on the same opinion in Dr. Hindricks's 2004 report.

Further, Judge Midlam cited an MRI scan that showed "mild degenerative changes" of the lumbar spine and a fluoroscopic study performed by Dr. Smith that indicated Crumlish "had a normal lumbar spine that was not the source of her low back pain." Judge Midlam also cited reports of other medical providers who did find industrial causation for the lumbar spine condition, including Dr. Auerback and Dr. Smith. Judge Midlam, however, found against Crumlish based on a preponderance of the evidence.¹⁰ Crumlish's assertion that Judge Midlam "completely ignored the evidence supporting industrial causation for the lumbar spine injury" is incorrect.

Judge Midlam's findings, adopted by the Board, are supported by substantial evidence and satisfy the *Topanga* standard. Indeed, Crumlish's petition shows the findings enabled her to determine whether and on what basis she should seek judicial review and, to apprise the reviewing court of the basis for the Board's action. (*Topanga, supra*, 11 Cal.3d at p. 514.) No speculation was required. Since the lumbar spine condition is not industrially caused, injuries arising from treatment of that condition are likewise not industrially caused. Thus, the findings were not required to address conflicting evidence on the cause of her memory loss.

¹⁰ " 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it.' " (*People v. Daugherty* (2011) 199 Cal.App.4th Supp. 1, 7.)

DISPOSITION

The judgment is affirmed. SDCERS is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McINTYRE, J.