Ceja, Pedro

RES JUDICATA

Allowance of Claim

Where the Department order allowing a claim as an industrial injury has become final and binding, the claim cannot later be recharacterized as an occupational disease claim to request acceptance of responsibility for additional conditions caused by employment conditions. Citing *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), the Board overruled previous Board decisions: *In re Robert E. Drury*, Dckt. No. 88 1149 (April 19, 1990); *In re Michael Katanik*, Dckt. No 09 12087 (July 22, 2010); *In re Robert D. Brezee*, Dckt. No. 15 13246 (August 11, 2016); *and In re Randy M. Black*, Dckt. No. 19 19894 (July 6, 2021). **….*In re Pedro Ceja,* BIIA Dec., 20 20398 (2022)** [dissent] [*Editor's Note:* The Board's decision was appealed to superior court under Yakima County Cause No. 22-2-021078-39.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PEDRO C. CEJA	**)**	**DOCKET NOS. 20 20398 & 20 20399**
	)	
CLAIM NO. BD-51367	**)**	**DECISION AND ORDER**

On May 1, 2018, Pedro Ceja was injured when he slipped while cleaning a fruit tub and hit his right knee. He sought medical treatment, and the Department of Labor and Industries issued an order allowing the claim as an industrial injury. In June 2020 the Department issued an order denying responsibility for the condition diagnosed as right knee osteoarthritis, and issued another order closing the claim with time-loss compensation ended as paid through April 10, 2019, and without permanent partial disability. Mr. Ceja appealed, seeking allowance of his right knee osteoarthritis, time-loss compensation, and further treatment, or in the alternative, an award for permanent partial disability or a determination he is permanently totally disabled. At trial, Mr. Ceja didn't present expert testimony that the injury caused or aggravated his arthritis. Rather, his experts testified that his conditions arose from the distinctive conditions of employment. Our industrial appeals judge affirmed the Department orders segregating right knee osteoarthritis and closing the claim without an award for permanent disability. Mr. Ceja filed this Petition for Review.

We agree with our industrial appeals judge. The Industrial Insurance Act allows claims for either injuries or occupational diseases. This is an injury claim, and the condition of arthritis isn't attributable to the injury. While it might be a condition that arose from the distinctive conditions of employment, we are bound to determine whether the *injury* caused this condition. As such, we granted review because Mr. Ceja argues that his claim should be allowed for an occupational disease related to his 25 years of agricultural plant sanitation work. The Washington Supreme Court unanimously held in *Marley v. Department of Labor & Industries*[1]that if party to a claim believes the Department erred in one of its decisions, that party must appeal the adverse ruling. The failure to appeal a Department order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim. In 2018, the Department allowed Mr. Ceja's claim as an industrial injury, not an occupational disease. Because no one filed a timely appeal from that order, the Department's order allowing the claim as an industrial injury became final, and Mr. Ceja is precluded from arguing that the claim should have been allowed as an occupational disease. The Department orders are affirmed.

[1] 125 Wn.2d 533 (1994).

DISCUSSION

On May 1, 2018, Mr. Ceja slipped and hit his right knee while cleaning tubs. He sought treatment and was treated for bilateral knee strains diagnosed by Kimberly Shipley, ARNP. The Department allowed the claim as an industrial injury. Ms. Shipley provided conservative treatment, consisting of physical therapy and anti-steroidal medication, which did not do too much to improve his condition. Ms. Shipley also diagnosed osteoarthritis in both knees that she related to kneeling on concrete for years in his employment as a sanitation worker. James R. Kopp, M.D., examined Mr. Ceja at his attorney's request. He diagnosed bilateral knee sprains that had resolved and preexisting degenerative joint disease of the right knee that was not permanently aggravated by the industrial injury. He did, though, diagnose severe chondromalacia of the patella in both knees that he believes is related to Mr. Ceja's years of kneeling in sanitation work. He felt this condition might benefit from surgical intervention and would prevent Mr. Ceja from returning to sanitation work. Ms. Shipley concurred in the opinions of Dr. Kopp. Both Ms. Shipley and Dr. Kopp agreed with David A. Bullock, PT, who conducted a physical capacities evaluation and concluded Mr. Ceja is no longer capable of working as a warehouse sorting or sanitation worker. We agree with our industrial appeals judge that Mr. Ceja did not prove by a preponderance of the evidence that the conditions that may not have resolved and result in limitations to employment are proximately caused by the industrial injury for which the claim was allowed. We agree that a preponderance of the evidence supports this holding.

In his Petition for Review, Mr. Ceja first argues that the Department accepted bilateral osteoarthritis in his knees when it authorized and paid for steroid injections. This argument is not persuasive. Both Dr. Kopp and the Department's examiner, Michael W. Gillespie, M.D., testified that Mr. Ceja's osteoarthritis is age appropriate and was not aggravated by the work injury. Further, there is insufficient evidence of what the Department authorized and paid for to determine what it might be responsible for notwithstanding the lack of convincing medical testimony.[2]

We have granted review to address Mr. Ceja's argument that the claim should be allowed as an occupational disease, and that due to the occupational disease he is permanently totally disabled. Mr. Ceja relies on the proposition in *Georgia-Pacific Plywood Co. v. Department of Labor & Industries,*[3] that the Industrial Insurance Act did not intend that an injured worker make a binding

[2] See, *In re Michael E. Gilmore,* Dckt. No. 20 10258 (May 21, 2021).
[3] 47 Wn.2d 893 (1955).

election as to the cause of his condition. We pointed out in *In re Michael Katanik*,[4] that *Georgia-Pacific Plywood* does not apply to an injury claim where, as here, in an appeal of the closing order a claimant seeks relief for an occupational disease condition not previously accepted, allowed, or treated under the claim.

We also point out that in *In re Robert E. Drury*,[5] we relied on *Georgia-Pacific Plywood* to conclude that in an appeal of a closure of an injury claim Mr. Drury was not barred from arguing an occupational disease produced his permanent disability. However, *Drury* was decided prior to *Marley v Department of Labor & Industries*.[6] In *Marley*, the court stated that "an unappealed final order from the Department precludes both parties from rearguing the same claim" and "the failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim."[7]

The dissent vigorously argues that *Weaver v. City of Everett*[8] supports Mr. Ceja's request that we allow his claim as an occupational disease. We disagree. We note that *Weaver* does not overrule *Marley*, in fact, it does not even mention it. Mr. Ceja did not cite *Weaver* in his Petition for Review, nor did he cite *Drury*. Our review of *Marley* and *Weaver* leads us to a different conclusion than our colleague.

The differences are obvious to us. Mr. Weaver, a firefighter suffering from cancer, was requesting allowance of an occupational disease claim. The Court noted the special circumstances for firefighters citing the statutory firefighters' presumption. This was, so to speak, Mr. Weaver's final chance to have his disease allowed and to receive benefits and the Court found that he had filed two separate claims for benefits and it refused to find the first order closing his claim was a final determination that would preclude his receiving benefits under collateral estoppel or res judicata. It based this decision on its belief that Mr. Weaver had filed two separate and distinct claims requesting temporary total disability benefits in the first claim and permanent total disability in the second claim.

Mr. Ceja's situation is very different. His testimony is that he struck his knee at work and sought medical care. This is the very definition of an industrial injury for which his claim was allowed. It was not until our industrial appeals judge issued his Proposed Decision and Order that Mr. Ceja's

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[4] Dckt. No 09 12087 (July 22, 2010).
[5] Dckt. No. 88 1149 (April 19, 1990).
[6] 125 Wn.2d 533 (1994).
[7] *Marley,* at 537-538.
[8] 194 Wn.2d 464 (2019).

attorney raised the issue of an occupational disease. We assume this is why the Department did not raise either collateral estoppel or res judicata during the hearing. Most importantly, Mr. Ceja can file a claim for an occupational disease contrary to Mr. Weaver's situation. He can file his claim and request the same relief from the Department that he requested in this appeal and the Department can determine to allow or deny his claim. He then has his full appeal rights should the Department deny his claim. We see no reason to abandon *Marley* based on these facts.

Drury is no longer good law. To the extent that they rely upon *Drury*, we also hold that prior decisions of the Board, *In re Michael Katanik,*[9] *In re Robert D. Brezee*,[10] and *In re Randy M. Black*,[11] were wrongly decided. Accordingly, in this case too, where Mr. Ceja appeals a closure of an injury claim where the order allowing the claim as an industrial injury is final, he is barred from seeking relief for conditions resulting from an alleged occupational disease for which no claim has been filed or allowed.

DECISION

1. In Docket No. 20 20398, the claimant, Pedro C. Ceja, filed an appeal with the Board of Industrial Insurance Appeals on July 24, 2020, from an order of the Department of Labor and Industries dated June 11, 2020. In this order, the Department denied responsibility for the condition diagnosed as right knee osteoarthritis because it wasn't caused or aggravated by the industrial injury. This order is correct and is affirmed.

2. In Docket No. 20 20399, Mr. Ceja filed an appeal with the Board of Industrial Insurance Appeals on July 24, 2020, from an order of the Department of Labor and Industries dated June 16, 2020. In this order, the Department closed the claim with no award of permanent partial disability and time-loss compensation as paid through April 10, 2019. This order is correct and is affirmed.

FINDINGS OF FACT

1. On November 30, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Pedro C. Ceja sustained an industrial injury on May 1, 2018, when he slipped and hit his right knee on the side of the tub while performing sanitation work at Zirkle Fruit. Mr. Ceja suffered bilateral knee sprains as a result of the industrial injury.

[9] Dckt. No 09 12087 (July 22, 2010).
[10] Dckt. No. 15 13246 (August 11, 2016).
[11] Dckt. No. 19 19894 (July 6, 2021).

3. On June 14, 2018, the Department of Labor and Industries issued an order in which it allowed Mr. Ceja's claim as an industrial injury. There is no evidence any party appealed the Department's order.

4. Mr. Ceja's right knee osteoarthritis was not proximately caused or aggravated by his May 1, 2018 industrial injury.

5. Mr. Ceja is 67 years old, illiterate, and has worked predominantly in the agricultural fields harvesting crops and in warehouses performing sanitation work. He has preexisting arthritis throughout the joints of his body and has bilateral chondromalacia.

6. Mr. Ceja has no physical limitations or restrictions proximately caused by his industrial injury from April 11, 2019, through June 15, 2020.

7. Based upon his condition proximately caused or aggravated by his industrial injury, Mr. Ceja was able to perform and obtain gainful employment on a reasonably continuous basis from April 11, 2019, through June 15, 2020.

8. As of June 16, 2020, Mr. Ceja's condition proximately caused by the industrial injury was fixed and stable and did not require further proper and necessary treatment.

9. On June 16, 2020, Mr. Ceja did not have a permanent partial disability proximately caused by the industrial injury.

10. Based upon his condition proximately caused or aggravated by his industrial injury, Mr. Ceja was able to perform and obtain gainful employment on a reasonably continuous basis as of June 16, 2020, due to the conditions proximately caused or aggravated by his industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. Under *Marley v. Department of Labor & Industries*, 125 Wn.2d 533 (1994), Mr. Ceja is precluded from relitigating the question of whether this claim is for an industrial injury or occupational disease.

3. Docket No. 20 20398: The Department order dated June 11, 2020, is correct and is affirmed.

4. Mr. Ceja was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from April 11, 2019, through June 15, 2020.

5. Mr. Ceja's conditions proximately caused by the industrial injury were fixed and stable as of June 16, 2020, and he is not entitled to further treatment. RCW 51.36.010.

6. Mr. Ceja's conditions proximately caused by the industrial injury were fixed and stable as of June 16, 2020, and he is not entitled to further treatment. RCW 51.36.010.

7. Mr. Ceja was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of June 16, 2020.

8. Docket No. 20 20399: The Department order dated June 16, 2020, is correct and is affirmed.

Dated: May 16, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS

MARK JAFFE, Acting Chairperson

JACK S. ENG, Member

DISSENT

Mr. Ceja worked 10-hour days, 7 days a week. For two hours each of those days, he wore kneepads and crawled on a cement floor using a squeegee to direct the flow of water and debris while he was cleaning the floors. Mr. Ceja wore kneepads supplied by the company, but after three or four days those would be worn out. The company would replace them, but usually about once a month. Mr. Ceja visited ARNP Shipley on June 12, 2018. His main concern was knee pain and swelling and popping from being on his knees every day at work. Mr. Ceja is Spanish monolingual and non-literate. ARNP Shipley originally diagnosed Mr. Ceja with bilateral knee sprains and filed an occupational disease claim for him. The Department allowed the claim as an industrial injury.

The majority finds that Mr. Ceja should have known when his claim was accepted for an industrial injury that, rather than getting treatment for his painful, swollen knees, Mr. Ceja should have appealed the allowance order. Despite his lack of English knowledge, lack of education, and his illiteracy, he should have understood the intricacies of workers' compensation law enough to know how very different industrial injuries and occupational diseases are treated by the Department. Despite the fact that nowhere on the order that allowed his claim does it explain that there are two different types of claims and his was allowed for something different than he was applying for. Despite the fact that applications for industrial injuries and occupational diseases utilize the same application form. Mr. Ceja should have understood that if he didn't protest the allowance of his claim, and argue to the Department that it was wrong for allowing his claim as an industrial injury because

it should have been allowed as an occupational disease, in two months, his path through the workers' compensation system would be cast in stone forever.

The sister doctrines of res judicata and collateral estoppel exist to promote judicial efficiency. They were designed to keep litigants from holding the court system hostage by relitigating the same issue or claim over and over again, and to ensure finality. A consequence of these doctrines, whether intended or unintended, is that in our court system there is a time limit on one's rights. It makes sense that there has to be some limit, otherwise a system that is already huge because it addresses the rights of every worker in the state, would become so unwieldy it would collapse under its own weight.

The proponent of the applications of both res judicata and collateral estoppel has the burden of proving four elements to demonstrate the necessity of its applicability: "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice."[12] "Because all four elements must be proved, the proponent's failure to establish any one element is fatal to the proponent's claim."[13]

The Industrial Insurance Act (the Act) created Title 51 in order to fix a system that was not getting injured workers the help they needed and was costly to the workers and employers alike. In this so called "grand bargain" work injuries were removed from the civil court system so that workers would get faster care and employers would not have to worry about being sued by their employees. Because a constitutional right was removed in this bargain, it falls to the Act to ensure that the rights of the parties are protected. More than 100 years of case law and statutory amendments have attempted to meet that demand.

More than 30 years ago this Board decided *In Re Robert Drury*.[14] Although not a significant decision in name, it has been significant in that a couple cases have followed its holding. In *Drury* the facts are very similar to the instant case. Mr. Drury filed a claim because he was no longer able to do his job due to pain, and the doctors stated that Mr. Drury's condition was a result of the repetitive use of equipment in his job. The Department order allowing Mr. Drury's claim referred to his condition as an injury. Our decision cited to *Georgia-Pacific Plywood Co. v. Department of Labor & Industries*

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[12] *Thompson v. Dep't of Licensing,* 138 Wn.2d 783 (1999) (quoting *Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 262–63 (1998)).
[13] *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 804–05 (2008).
[14] Dckt. No. 88 1149 (April 19, 1990).

holding, "It was never intended that, when a workman's right to the benefits of the workmen's compensation act on one basis or another is clear, he should have to make a binding election between the possible causes of his condition."[15] We recognized that the legal difference between an industrial injury and an occupational disease was beyond the understanding of many workers and the worker should not be required to "be able to make a technical medical-legal distinction between the two," and he was not barred from arguing that his condition was an occupational disease even though the appeal window for the allowance order had long since closed.[16]

The majority points to the fact that *Marley v Department of Labor & Indus*tries was decided after *Drury*, and suggests that renders *Drury* no longer good law. I disagree for three reasons. First, res judicata (like collateral estoppel) is an affirmative defense. The party asserting it has the burden of proof.[17] Normally that would be the Department, but the Department did not assert either collateral estoppel or res judicata. The Department did not, in fact, even object to the testimony concerning conditions of employment. Contrary to the majority's assertion that Mr. Ceja's attorney did not raise occupational disease until after the Proposed Decision and Order was issued, there are many references to occupational disease woven throughout the testimony, from the attending ARNP testifying that she filed an occupational disease claim, to Dr. Gillespie, the Department's orthopedic expert witness being asked by the Department whether Mr. Ceja's osteoarthritis was a "proximate result of the work he was doing."[18]

Second, Drury *et al* and the instant case are distinguishable from *Marley*. In *Marley* a widow was denied benefits by Department order and did not appeal that order. The very fact that the benefits were denied made it evident that if she didn't appeal she would lose out on those benefits. Additionally, the order specified what benefits were denied, so she was on notice as to exactly what was under consideration. In *Drury* and the instant case, the claims were allowed. They were just allowed for an industrial injury rather than an occupational disease. These are terms of art that the average worker doesn't understand. And, as noted in *Drury*, nowhere on the order does it say that the occupational disease is denied. But somehow the worker is supposed to intuit that allowance of one means that the other is denied? Many workers that file claims are unsophisticated, and in the

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[15] *Georgia-Pac. Plywood Co. v. Dep't of Labor & Indus.,* 47 Wn. 2d 893 (1955).
[16] *In re Robert E. Drury*, Dckt. No. 88 1149 (April 19, 1990).
[17] *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304 (2002); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH L.REV. 805, 812–13 (1985).
[18] Gillespie Dep. at 18

case of Mr. Ceja, uneducated. But even highly educated workers would not necessarily understand that the fact the Department allowed a claim for an industrial injury could mean that if they don't protest the allowance order, that very allowance order acts as a denial for other rights even though it's not noted anywhere on the order.

Third, *Marley* has been limited by the Legislature and the Washington Supreme Court since it was decided in 1994. After Marley was decided the Legislature amended the statute in 1999 to create a way for workers to recover underpaid benefits in certain circumstances even if the worker had not appealed the order granting those benefits within the requisite 60 days. In 2016 in *Birrueta v Department of Labor and Industries*[19] the Supreme Court acknowledged that the Legislature had amended the statute in direct response to its holding in *Marley*. More importantly, in 2019, the Court decided *Weaver v. City of Everett*,[20] also a unanimous decision, and although it didn't specifically mention *Marley*, *Weaver* very specifically shows that the determination of whether a claim is barred through res judicata or collateral estoppel is not simply an exercise of deciding whether a worker could have brought a claim within the allotted appeal window.

The Court explained "For res judicata purposes, cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment."[21] In *Weaver* the Court focused on "identity of subject matter," which is one of four elements used to determine if res judicata applies.[22] It determined that there was no identity of subject matter because the latter claim did not exist at the time of the former claim. Here, Mr. Ceja's claim for allowance of osteoarthritis did not exist at the time of the claim allowance order. If he had appealed the allowance order he could not have brought a claim for allowance of that specific condition. The Department would have been the first to argue that the Board lacked subject matter jurisdiction to hear that argument at that time. On this basis alone res judicata should not apply.

The *Weaver* court also addressed collateral estoppel. *Collateral estoppel* is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. But the majority has

[19] 186 Wn.2d 537.
[20] 194 Wn.2d 464.
[21] *Weaver*, at 467.
[22] *Weaver*, at 482.

asserted that the industrial injury determination is res judicata, and because the *Weaver* court addressed both, I will as well.

"To determine whether collateral estoppel will work an injustice, we ask whether the party against whom the doctrine is asserted had "sufficient motivation for full and vigorous litigation of the issue" in prior proceeding."[23] Mr. Weaver had a hearing on his original claim, which he lost, and he appealed it to superior court. He then later dismissed that appeal. The court looked at whether he had the same motivation to vigorously litigate that original appeal when he thought his cancer had been cured and all that was at stake was some time-loss compensation, as he did in his second appeal when his cancer had returned and rendered him incapable of working at all. The court found that Mr. Weaver, thinking his cancer was cured and potentially having to spend more money than he would win by fully litigating the first claim, did not have sufficient motivation to vigorously litigate in the first proceeding to bar him from bringing the second claim.

Mr. Ceja not only had *no* motivation to litigate his claim allowance order, he likely had no idea that he should. His entire reason for filing was to have his claim allowed so he could get treatment. His claim was allowed. Why would he argue against himself? He couldn't have known that the very condition that caused him to file the claim would be segregated years later because of the wording on that allowance order. Wording that he couldn't read.

"Like its sister doctrine, collateral estoppel, "res judicata . . . is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice.""[24] The thread of justice is woven throughout *Weaver*. Neither doctrine is to be applied if that application will work an injustice. Here, the majority not only reaches an unjust result by rigidly applying the doctrine of res judicata without consideration of the individual circumstances of Mr. Ceja, but it compounds that injustice by overturning *Drury*. Just when the highest court in the state is moving toward a more just system, this Board is moving backward.

The doctrines of res judicata and collateral estoppel work as a limit on the system to ensure that it does not get bogged down, so that everyone has an opportunity to be heard. In the more than three decades since *Drury* was decided a search for cases that cite to *Drury* results in three cases and only two of those cases actually followed *Drury*. One case per decade is not creating a glut of

[23] *Weaver*, at 473.
[24] *Weaver*, at 482.

the system. It is evidence that, the decision to allow a "second bite of the apple" had been applied sparingly, and only when the facts and justice called out for it.

Throughout the history of the Act the rules have been adjusted to ensure that the promise of swift and certain relief is met. Bold print has become required on all determinative orders to alert the claimants that failure to appeal that order will result in that order becoming final. This works well when the specific benefit being allowed or denied is spelled out in the order. But in the case of allowance orders there is nothing in the wording that explains that the granting of one benefit means the loss of another by failure to appeal the order. Until the Department either issues allowance orders that allow a generic claim without the injury/disease distinction, or it explains the distinction in detail so the claimant can make an informed decision whether to appeal, I would follow *Drury* for every allowance. To do otherwise is contrary to established administrative law that requires an agency to make clear when a person is in danger of losing a benefit. And, more importantly, it is unjust. Therefore, I dissent.

May 16, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re Pedro C. Ceja
Docket Nos. 20 20398 & 20 20399
Claim No. BD-51367

Appearances

Pedro C. Ceja, by Smart Law Offices, per Nicholas D. Jordan

Employer, Zirkle Fruit Co. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Dale E. Becker

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. Mr. Ceja filed a timely Petition for Review of a Proposed Decision and Order issued on December 21, 2021, in which the industrial appeals judge affirmed the orders of the Department dated June 11, 2020, and June 16, 2020.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.