

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1996 MTWCC 35**

**WCC No. 9604-7537**

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**DEBBIE I. GALLUP**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**AMEX TAX AND DUTY FREE SHOPS**

**Employer.**

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**ORDER DISMISSING PETITION**

**Summary:** On a prior petition, this Court found claimant's recurrences of hidradenitis suppurative were related to her industrial injury, but rejected her claim that she was temporarily totally disabled after April 7, 1993. In this petition, she renews her request for temporary total disability benefits, contending she now has additional information to support her claim. Respondent argues the request is barred by the doctrine of res judicata for the period before the prior trial. With regard to the subsequent period, the insurer argues the claim has not been mediated and that the Court thus lacks jurisdiction.

**Held:** The petition is dismissed. The doctrine of res judicata bars claimant from relitigating her claim for temporary total disability benefits for the period before her prior trial. That doctrine does not bar a claim for TTD benefits for the period following trial, but to recover, claimant must prove that her condition changed. Because mediation has not taken place with regard to whether claimant's condition has changed, or regarding the travel expenses she also now claims, the Court does not have jurisdiction over those issues.

**Topics:**

**Benefits: Temporary Total Benefits.** Where claimant's request for temporary total disability benefits was denied in a prior case, the doctrine of res judicata bars her present attempt to obtain temporary total disability benefits for the period prior to the last trial. Any claim for TTD benefits for the period after the previous trial must turn on whether claimant's condition changed.

**Defenses: Res Judicata.** Where claimant's request for temporary total disability benefits was denied in a prior case, the doctrine of res judicata bars her present attempt to obtain temporary total disability benefits for the period prior to the last trial. Any claim for TTD benefits for the period after the previous trial must turn on whether claimant's condition changed.

**Mediation.** Where claimant failed to prove her entitlement to TTD benefits in a prior trial, her present petition for TTD benefits must turn upon whether her condition has changed in the period following trial. Where the issue of change in her condition was not mediated, the Court has no jurisdiction over the present petition.

This is the second petition filed by the claimant, Debbie I. Gallup. The first petition, WCC No. 9503-7257, went to trial on October 13, 1995, and was decided February 9, 1996. In its decision this Court determined that recurrences of claimant's hidradenitis suppurative are related to her initial industrial injury and thus compensable. However, the Court refused claimant's request for additional temporary total disability benefits, finding that she had failed to carry her burden of proving she was temporarily totally disabled after April 7, 1993. Neither party appealed the decision.

In her second petition, filed April 19, 1996, the claimant renews her request for temporary total disability benefits, alleging that she now has additional information to support her claim. She also seeks payment of travel expenses incurred for medical treatment.

The respondent, State Compensation Insurance Fund, moves to dismiss the petition, asserting that the claim for temporary total disability benefits, at least for the period prior to the Court's February 9, 1996 decision, is barred by the doctrine of res judicata. As to any entitlement after February 9, 1996, and to travel expenses, the State Fund asserts that the Court lacks jurisdiction over these issues since they have not been mediated.

#### I. Res Judicata

The doctrine of res judicata prohibits relitigating matters "that the party has already had an opportunity to litigate." *Greenwood v. Steve Nelson Trucking*, 270 Mont. 216, 220, 890 P.2d 765, 767 (1994). The doctrine "reflects the ideal that a lawsuit should provide justice for an aggrieved party as well as a final resolution of the controversy. Its underlying purpose is to prevent a party from litigating a matter more than once." *State Medical Oxygen v. American Medical Oxygen*, 256 Mont. 38, 42, 844 P.2d 100, 103 (1992) (citations omitted).

Application of the doctrine requires proof of four elements. Those elements are:

(1) the subject matter of each action must be the same; (2) the parties or their privies of each action must be the same; (3) the issues must be the same and relate to the same subject matter; (4) the capacities of the persons must be the same in reference to the subject matter and to the issues between them.

*City of Bozeman v. AIU Ins. Co.*, 900 P.2d 929, 932 (Mont. 1996). No extended discussion is necessary to show that all four elements are met in this case with respect to any claim for temporary total disability benefits prior to the trial on October 13, 1995. The parties are identical. The claimant sought temporary total disability benefits and the Court decided that claim; thus, the subject matter and the issue are identical. The Court knows of no exception to res judicata based on alleged discovery of new medical evidence. I therefore find that claimant's request for temporary total disability benefits prior to October 13, 1995, is barred.

While respondent argues that the bar should be applied as of the date of decision, the date of trial is the proper date. All evidence was submitted as of that date. In issuing its decision, the Court considered her condition and claims as of that date.

Claimant's request for temporary total disability benefits commencing *after* October 13, 1995, may or may not be barred. Section 39-71-739, MCA (1991), which was in effect at the time of the claimant's industrial injury, provides:

**39-71-739. Compensation in case of changes in degree of injury.** If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is established or compensation is terminated in any case where the maximum payments for disabilities as provided in this chapter are not reached, adjustments may be made to meet such changed conditions by increasing, diminishing, or terminating compensation payments in accordance with the provisions of this chapter.

Under this section, a *change* in claimant's condition may give rise to additional entitlement to compensation. Claimant must, however, prove that since October 13, 1995, there has been an "aggravation" of her disability. If, on the other hand, her condition is unchanged since October 13, 1995, and she is simply attempting to relitigate the Court's finding that she was not temporarily totally disabled, then her claim for temporary total benefits after October 13, 1995, is barred by the doctrine of res judicata.

## II. Mediation

The claimant concedes that no mediation has occurred since the trial and that the controversy over travel expenses has not been mediated. Indeed she specifically alleges in paragraph XII of her petition that "[s]ince Petitioner's claim has already been before the Workers' Compensation Court, no additional mediation proceeding should be necessary."

Mediation is mandatory. It extends to all disputes and issues brought before the Court. §39-71-2401, MCA (1991). Parties cannot mediate one issue, then petition the Court with respect to other, non-mediated issues. Mediation has not taken place with respect to any contention that claimant's condition has changed or that she is entitled to travel expenses. Thus, claimant has not complied with the mediation requirements and the Court presently lacks jurisdiction over those issues. §§ 39-71-2401(1) and -2905, MCA (1991).

ORDER

The claim for temporary total disability benefits prior to October 13, 1995, must be, and is hereby, **dismissed with prejudice**. The remaining claims are **dismissed without prejudice**.

So Ordered.

Dated in Helena, Montana, this 21st day of May, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Ms. Ann E. Clark

Submitted: May 15, 1996

Attachments from WCC No. 9503-7257:

[Pretrial Order filed 10/6/95](#)

[Findings of Fact, Conclusions of Law and Judgment filed 2/9/96](#)