IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 1

WCC No. 9812-8125

CHARLES C. HODGE,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

FIGGINS SAND & GRAVEL, INCORPORATION,

Employer.

ORDER DENYING MOTION TO STRIKE FRAUD DEFENSE

Summary of Case: Claimant filed a petition seeking benefits. Meanwhile, he was criminally prosecuted for workers' compensation fraud. The insurer moved to stay the petition for benefits until the criminal prosecution was resolved, as allowed by section 39-71-2911, MCA. Claimant was acquitted and now moves to strike the insurer's affirmative defense alleging fraud.

Held: The motion to strike is denied. Staying the petition for benefits does not bar an affirmative defense based upon fraud where a claimant is found not guilty. Permitting the insurer to raise a fraud defense in a proceeding for benefits does not constitute double jeopardy. The verdict in the criminal case is not *res judicata* since the standard of proof is significantly greater in a criminal action than a civil one. Moreover, even if the fraud defense were stricken, evidence of fraud may be admissible with respect to claimant's credibility in determining the nature of his disability.

Topics:

Montana Code Annotated: 39-71-2911. A stay of a petition for benefits under section 39-71-2911 while criminal charges for workers' compensation fraud are prosecuted does not preclude an insurer from raising fraud as a defense where claimant is acquitted of the criminal charge.

Statutes and Statutory Interpretation: Inserting or Removing Terms: The Court cannot write into a statute providing a stay of proceedings while criminal charges

are pending a prohibition against an insurer raising a fraud defense in the event the claimant is acquitted. Sec. 1-2-101, MCA.

Constitutional Law: Double Jeopardy. The double jeopardy clauses of the United States and Montana Constitutions do not preclude an insurer, even the State Fund, from raising an affirmative defense of fraud after claimant has been acquitted of fraud in a criminal prosecution. Denial of benefits based upon fraud is not a penalty within the meaning of the double jeopardy clause.

Montana State Constitution: Art. II, sec. 25. The double jeopardy clause of the Montana Constitution does not preclude an insurer, even the State Fund, from raising an affirmative defense of fraud after claimant has been acquitted of fraud in a criminal prosecution. Denial of benefits based upon fraud is not a penalty within the meaning of the double jeopardy clause.

United States Constitution: Amendment V. The double jeopardy clause (Amendment V) of the United States Constitution does not preclude an insurer, even the State Fund, from raising an affirmative defense of fraud after claimant has been acquitted of fraud in a criminal prosecution. Denial of benefits based upon fraud is not a penalty within the meaning of the double jeopardy clause.

Judgments: Res Judicata. *The doctrine of res judicata* does not bar an insurer, even a governmentally sponsored one such as the State Fund, from pursuing an affirmative defense of fraud in claimant's action for benefits even though claimant was acquitted of fraud in a criminal action since the burden of proof in the criminal case (beyond a reasonable doubt) was significantly higher than in a claim for benefits (preponderance.) *Restatement of Law Second, Judgments, secs. 27, 28, 85.*

Judgments: Collateral Estoppel. The doctrine of *res judicata* does not bar an insurer, even a governmentally sponsored one such as the State Fund, from pursuing an affirmative defense of fraud in claimant's action for benefits even though claimant was acquitted of fraud in a criminal action since the burden of proof in the criminal case (beyond a reasonable doubt) was significantly higher than in a claim for benefits (preponderance.) *Restatement of Law Second, Judgments, secs. 27, 28, 85.*

Fraud. *Res judicata,* collateral estoppel and double jeopardy doctrines do not preclude an insurer, even a governmentally state sponsored insurer such as the State Fund, from raising an affirmative defense of fraud with respect to benefits due a claimant despite claimant's acquittal of fraud charges in a criminal action.

Defenses: Fraud. *Res judicata*, collateral estoppel, and double jeopardy doctrines do not preclude an insurer, even a governmentally state sponsored insurer such as

the State Fund, from raising an affirmative defense of fraud with respect to benefits due a claimant despite claimant's acquittal of fraud charges in a criminal action.

Evidence: Fraud. Where claimant is seeking additional workers' compensation benefits, evidence of fraud may be admissible irrespective of the insurer alleging an affirmative defense of fraud since such evidence may undermine claimant's credibility and his claim as to the nature and extent of his disability.

Evidence: Credibility. Where claimant is seeking additional workers' compensation benefits, evidence of fraud may be admissible irrespective of the insurer alleging an affirmative defense of fraud since such evidence may undermine claimant's credibility and his claim as to the nature and extent of his disability.

¶1 Claimant herein seeks to strike the State Fund's affirmative defense which alleges fraud.

Background

¶2 On December 24, 1998, the claimant filed his petition for hearing seeking permanent total disability benefits and, in the alternative, permanent partial disability benefits. In his petition he alleges that he suffered an industrial injury on June 20, 1995, and that his injury was accepted as compensable by the State Fund, which insured his employer. The State Fund thereafter paid him benefits. He goes on to allege that, as a result of surreptitious surveillance, the State Fund terminated his benefits in June 1997.

¶3 On March 26, 1999, the State Fund moved to stay further proceedings in this case based upon felony theft charges filed against the claimant on March 2, 1999. (motion for stay of proceedings.) The criminal charges were based on claimant's obtaining benefits from the State Fund in connection with his June 20, 1995 injury.

¶4 On April 14, 1999, pursuant to section 39-71-2911, MCA, I granted a stay pending resolution of the criminal action.

¶5 On April 5, 2000, claimant's counsel responded to the Court's request for a status report concerning the criminal action. He reported that the "criminal matter . . . was tried in February resulting in a hung jury and is now scheduled for retrial July 10, 2000." (April 5, 2000 Letter of Charles F. Angel.)

¶6 On September 13, 2000, claimant's attorney wrote the Court to advise that the retrial began on September 6, 2000 and that on September 8, 2000, a jury found claimant "not guilty." (September 13, 2000 Letter of Charles F. Angel.)

¶7 On September 15, 2000, the Clerk of this Court issued a new scheduling order, ending the stay. On that same date, the State Fund filed its motion for leave to amend response to petition for hearing to "delineate fraud as an affirmative defense." The claimant did not object to the motion other than to say, "[I]t is Petitioner's position that if Respondent wants

to raise fraud as an affirmative defense, it should plead the circumstances constituting the nine elements with particularity, and not be allowed to raise that defense by the simple use of one word, 'Fraud'." (brief concerning objection to motion to amend at 2.) I granted the motion with the proviso that fraud must be pleaded in accordance with Rule 9(b), Mont.R.Civ.P. (order granting motion to amend response (October 18, 2000).)

¶8 On November 1, 2000, the State Fund filed respondent's second amended response to petition for hearing. Therein, the State Fund set out an affirmative defense of fraud. (*Id.*)

¶9 Then, on January 2, 2001, claimant filed his motion to strike the fraud defense.

Discussion

¶10 Claimant's motion is predicated upon his acquittal in the criminal case. He argues that section 39-71-2911, MCA, bars the State Fund's fraud defense, and that the defense is also barred under the doctrines of *res judicata* and double jeopardy.

Section 39-71-2911, MCA, provides:

> **Stay pending determination by district court.** Upon a motion and filing of an affidavit by either party and after a hearing, the workers' compensation judge may grant a stay of proceedings in the workers' compensation court if a criminal action involving workers' compensation insurance fraud by a claimant has been filed in district court.

On its face, the section does not preclude continuation of proceedings in this Court following resolution of the criminal matter, nor does it bar an affirmative defense of fraud in the event of acquittal. Furthermore, I decline to write in any such requirements. Section 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.").

¶11 Contrary to claimant's argument (motion to strike allegations of fraud at 2), allowing an insurer to assert a fraud defense despite an acquittal does not "defeat" the purposes of section 39-71-2911, MCA. While a conviction may alleviate the need for any further action in this Court, an acquittal simply means that a jury did not find the claimant guilty *beyond a reasonable doubt* of the criminal offense. The standard of proof in a civil proceeding is less burdensome than the criminal one: Fraud in a civil action need only be proven by a preponderance, *Sandman v. Farmers Ins. Exchange,* 291 Mont. 456, 472, 969 P.2d 277, 286 (1998). Thus, while the criminal action may effectively resolve the issue of claimant's entitlement to benefits if the claimant is found guilty, it does not do so if he is acquitted.

¶12 Claimant further argues that permitting the State Fund to pursue its affirmative defense "would be akin to double jeopardy." Claimant cites cases holding that civil penalties for the same offense may constitute double jeopardy, e.g., *Montana Department*

of Revenue v. Kurth Ranch, 511, U.S. 767 (1994). Those cases, however, concern an additional penalty imposed against an individual with respect to a crime. The issue in this case is not a penalty, rather it is claimant's entitlement to a benefit. Denial of a benefit because claimant does not qualify for the benefit on account of his fraud, assuming he committed fraud, is not a penalty within the meaning of the double jeopardy clause. *See State v. Schnittgen,* 277 Mont. 291, 306, 922 P.2d 500, 509 (1996); *Stuart v. Montana Department of Social and Rehabilitation Services,* 256 Mont. 231, 237, 846 P.2d 965, 969 (1993).

¶13 Finally, claimant contends that the verdict in the criminal case is *res judicata* or collateral estoppel. It is not.

¶14 *Restatement of the Law Second, Judgments*, sets out the applicable rules. Section 85 addresses the effect of a judgment in a criminal case. As applicable to the present case, it says:

> With respect to issues determined in a criminal prosecution:
>
> . . . .
>
> **(3) A judgment against the prosecuting authority is preclusive against the government only under the conditions stated in §§ 27-29.** [Emphasis added.]

I assume, without deciding, that the State Fund is at least in privity with the prosecuting authority such that the rule applies in this case.

Section 27 of the Restatement, which is referenced in section 85, states:

> § 27. ISSUE PRECLUSION--GENERAL RULE
>
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.
>
> **Exceptions to this general rule are stated in § 28.** [Emphasis added.]

This leads us to section 28, which provides:

> § 28. EXCEPTIONS TO THE GENERAL RULE OF ISSUE PRECLUSION
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> **(4) The party against whom preclusion is sought had a significantly heavier**

> **burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action;** or [Emphasis added.]
>
> . . . .

¶15 "We shall not cease from exploration; and the end of all our exploring will be to arrive where we started and to know the place for the first time. " T.S. Elliot, *Little Gidding*. And, so here we arrive where we started, at the question of the preclusive effect of the criminal acquittal. As set out in the Restatement, where the burden of proof is "significantly heavier" in the prior action, the verdict in the prior action is not preclusive. The standard of proof in the criminal action was beyond a reasonable doubt. The standard of proof in the present action is a preponderance. Thus, claimant's acquittal is not *res judicata* as to his entitlement to benefits.

¶16 Finally, I note that even if the affirmative defense is stricken, much of the evidence supporting that defense, for example, surveillance tapes and evidence of false statements, may be admissible in any event. Claimant is seeking additional benefits. He must prove by a preponderance of evidence that he is entitled to the additional benefits. Insofar as a determination of the nature of his disability requires an assessment of his credibility, the insurer is entitled to offer evidence impeaching his credibility.

ORDER

¶17 The motion is **denied**.

DATED in Helena, Montana, this 17th day of January, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Charles F. Angel
Mr. Greg E. Overturf
Submitted: January 12, 2001