

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 46

WCC No. 9604-7532

RALPH KRESS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

JIM AND LOUIE BOUMA

Employer.

ORDER PARTIALLY GRANTING MOTION TO DISMISS

Summary: In a prior case (Kress 1), claimant sought to reopen his settlement with State Fund and requested medical benefits, temporary total disability benefits, and permanent partial disability benefits. The judgment in Kress 1 granted claimant=s request for reopening and medical benefits, but denied his claims for temporary total or permanent partial benefits. Now, claimant requests temporary total disability benefits retroactive to his time of injury and continuing into the future. Respondent argues the request is barred by the doctrine of res judicata.

Held: In Kress 1, claimant sought temporary total disability benefits but failed to carry his burden of proof. Under the doctrine of res judicata, any claim for temporary total disability benefits through the date of the prior trial is barred. Because it is possible that claimant=s condition after the date of the prior trial changed to render him disabled, a claim that he was temporarily totally disabled after the prior trial is not barred by res judicata. However, claimant must prove there has been an aggravation of his disability.

Topics:

Benefits: Temporary Total Benefits. Where claimant sought temporary total disability benefits in a prior case, and failed to carry his burden of proof, the doctrine of res judicata bars any subsequent attempt to obtain temporary total disability benefits for the period prior to the date of the last trial. However, because claimant=s condition may have deteriorated after the previous trial, a claim for

entitlement to temporary total disability benefits after the prior trial may proceed, but claimant must prove there has been an aggravation of his disability.

Defenses: Res Judicata. Where claimant sought temporary total disability benefits in a prior case, and failed to carry his burden of proof, the doctrine of res judicata bars any subsequent attempt to obtain temporary total disability benefits for the period prior to the date of the last trial. However, because claimant's condition may have deteriorated after the previous trial, a claim for entitlement to temporary total disability benefits after the prior trial may proceed, but claimant must prove there has been an aggravation of his disability.

This is the second petition filed by the claimant, Ralph Kress, within the last two years. In the first action, *Ralph Kress v. State Compensation Insurance Fund*, WCC. No. 9505-7292, decided December 27, 1995 (*Kress 1*), this Court entered judgment granting Kress' request to reopen a 1993 settlement. The judgment further ordered the respondent, State Compensation Insurance Fund, to pay Kress' medical bills for treatment of his back and groin conditions. However, it denied Kress' alternative claims for temporary total disability benefits and permanent partial disability benefits.

In his second petition, which this Order addresses, Kress seeks retroactive and prospective temporary total disability benefits. (Petition to Declare Petitioner Totally Disabled (etc) ("Petition").) While his petition in *some* places refers to "total disability benefits" (Petition at caption, introductory paragraph, ¶s VII, IX, and X), thereby failing to distinguish between "temporary" and "permanent" total disability benefits, read in its entirety his petition sets forth a claim for *temporary* total disability benefits *only*. In paragraph I Kress refers to this Court's prior judgment denying temporary total disability benefits. In paragraph II he alleges that his failure to provide sufficient proof of temporary total disability in the prior action was on account of his inability to pay for medical evidence. In paragraph VI, he specifically alleges that he is entitled to retroactive, current and ongoing temporary total disability benefits:

Except as noted above, Petitioner has not worked since the 1991 accident and is entitled to retroactive temporary total disability benefits (less his actual income as noted above) from the date when the insurer terminated his temporary total disability benefits to the current time. Petitioner is further entitled to current and ongoing temporary total disability benefits.

Finally, in his second and third prayers for relief, he requests that the Court:

2. Award Petitioner current total disability benefits.
3. Award Petitioner retroactive temporary disability benefits from the date of termination of said benefits less his income as noted in this petition to the current time.

Based on *Kress 1*, the State Fund moves to dismiss the second petition on res judicata grounds. (Motion and Brief to Dismiss for Res Judicata.)

Discussion

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 idea 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., 272 Mont. 349, 352-53, 900 P.2d 929, 932 (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 of this matter, which was held 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.

Kress argues, however, that in its original decision the Court did not in fact rule on his request for temporary total disability benefits. He asserts that in finding that he was not "presently" entitled to temporary total disability benefits, the Court "did not rule out the right of Petitioner to obtain such benefits should the evidence warrant." (Response to Respondent's Motion to Dismiss for Res Judicata at 1.) He further states:

The Conclusions of Law [in *Kress 1*] reflect the fact that Petitioner did not produce evidence regarding the claim for further temporary total disability benefits and/or permanent partial disability benefits, and *therefore the Court was unable to make any determination on those issues.*

(*Id.*; italics added)

Kress misreads this Court's prior decision. The Conclusions of Law and Judgment squarely address and reject his request for temporary total disability benefits. In Conclusion of Law 4, I said:

4. Claimant has failed to persuade me that he is presently entitled to additional temporary total disability benefits. He has not presented evidence concerning the

amounts and duration of the temporary total benefits that were paid to him. The proposed findings of facts as well as the evidence he presented, fail to disclose either the amount or the period of time of his alleged entitlement.

And in paragraph 3 of the Judgment, I determined:

3. Claimant is not presently entitled to further temporary total disability benefits or to any further permanent partial disability benefits.

Kress 1 was **not** a case in which a claimant merely sought to rescind a prior settlement and obtain medical benefits: Kress affirmatively asked the Court to award him retroactive and current temporary total disability benefits. *Kress 1* was **not** a case in which the Court bifurcated or deferred consideration of a request for temporary total disability benefits, and indeed Kress did not ask for bifurcation or postponement of that issue. Rather, the case was one in which the claimant sought temporary total disability benefits but failed to carry his burden of proof. The decision in *Kress 1* is clear in that regard. The use of the word "presently" in the judgment does not suggest that Kress may later reopen the matter, only that at the time of trial he was not entitled to further benefits, leaving open the possibility that the claimant's condition might change such that he might be entitled to *future* benefits. Therefore, Kress' claim for retroactive temporary total disability is foreclosed through the date of the prior trial.

His 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 Kress' disability may give rise to additional entitlement to compensation. He must, however, prove that since October 13, 1995, there has been an "aggravation" of his disability. If, on the other hand, his disability is unchanged since October 13, 1995, and he is simply attempting to relitigate the Court's finding that he was not then temporarily totally disabled, then his claim for temporary total benefits after October 13, 1995, is also barred by the doctrine of res judicata.

Although not entirely clear to the Court from its reading of the State Fund's brief at pages 2 and 3, it appears that the State Fund argues that any claim for prospective total disability

benefits (apparently either temporary total or permanent total) is barred by the original settlement agreement and this Court's Conclusion of Law 6 in *Kress 1* determining that "despite setting aside the settlement, neither party is entitled to additional relief regarding compensation benefits." If I have correctly perceived the argument, then I find it to be without merit since the settlement was set aside and voided and the Court's decision only addressed claimant's entitlement to temporary total disability benefits on or prior to October 13, 1995. If I have misread the argument, I am at a loss to determine what argument the State Fund intends to proffer and therefore cannot address it.

ORDER

For the reasons set forth in the foregoing discussion, Kress' claim for temporary total disability benefits prior to and including October 13, 1995, is **dismissed**. He may pursue a claim for temporary total disability benefits allegedly due after October 13, 1995, but must prove that his disability has deteriorated or been aggravated since October 13, 1995.

Dated in Helena, Montana, this 25th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Daniel J. Whyte

Submitted: May 9, 1996