

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 4

WCC No. 9301-6685

GARY D. MOTICHKA

Petitioner

vs.

PLUM CREEK TIMBER COMPANY

Defendant/Employer.

DECISION AND ORDER ON MOTION TO RECONSIDER; ORDER VACATING AND RESETTING TRIAL

The petitioner is appealing from a decision of the Montana Department of Labor (DOLI) determining that his present disability is related to an occupational disease but apportioning only 30% of his disability to that disease. His appeal was filed January 29, 1993. Subsequently, on March 29, 1993, petitioner (as claimant) filed a petition alleging that his disability stems from a January 2, 1980 job-related injury. WCC No. 9303-6749. Petitioner requested the Court to continue the proceedings in this appeal while he litigates his injury claim. He also filed a separate motion to consolidate the two cases.

After a series of orders and requests for reconsideration, on May 19, 1993, the Court entered an ORDER GRANTING CONTINUANCE wherein it ordered "that claimant's appeal from the DOLI is continued without date." The Order was expressly premised on the Court's "belief" that *Poppleton v. Home Indemnity Co.*, 226 Mont. 267, 735 P.2d 286 (1987), is controlling precedent in resolving the clash between the DOLI decision and the petition for workers' compensation benefits. The Court never ruled on the motion for consolidation, perhaps deeming it unnecessary to do so in light of the indefinite continuance granted with respect to the appeal. It thereafter scheduled a trial of the petition for the Court's Fall Kalispell term. The trial is presently scheduled for the week of October 11, 1993.

On September 3, 1993, respondent, Plum Creek Timber Company, filed a motion requesting reconsideration of the May 19, 1993 Order. It argues that the Court's reliance on *Poppleton* was misplaced. Citing *Martelli v. Anaconda-Deer Lodge County*, 50 St. Rptr. 479, 852 P.2d 579 (1993), it further argues that petitioner is collaterally estopped from re-litigating the cause of his disability.

After careful consideration the Court has determined that the trial setting for the petition in WCC No. 9303-6749 should be vacated. It has also determined that briefing and argument should proceed in this appeal and that the parties should be permitted to present further argument concerning the preclusive effect, if any, of the DOLI decision.

In reaching its determination, the Court is aware of the general rule that "judges of coordinate jurisdiction sitting in the same court and in the same case may not ordinarily overrule the decisions of each other." **Hayworth v. School district No. 19**, 243 Mont. 503, 505, 795 P.2d. 470 (1990). However, "this rule is not an imperative" and the Court does have some discretion in "appropriate circumstances" to reconsider a previous ruling by another judge in the same case. *Id.*

The May 19, 1993 Order on its face is a procedural one which stays further proceedings. An indefinite stay of proceedings may be lifted at a later time, so the present Court does not read the previous Order as preventing it from lifting the stay upon motion of a party or sua sponte.

However, the substantive basis of the Order is not so easily disregarded. Nonetheless, there are several compelling reasons to reconsider the rationale of the decision. First, the **Poppleton** decision was not mentioned or discussed by either party in their briefs regarding the motion for continuance. That omission is important because the Court's reliance on **Poppleton** has far broader consequences to the parties than the mere granting of a continuance. Indeed, it affects the nature and merits of both proceedings. Second, the Order sets forth the Court's "belief" that **Poppleton** is controlling, indicating a lack of certainty or finality with regard to substantive issues. Third, there is no indication that the Court considered the procedural history of the DOLI proceeding or the specific issues determined by the DOLI.

Poppleton held that an award of occupational benefits by the Division of Workers' Compensation does not preclude an injured worker from seeking workers' compensation benefits. The Supreme Court specifically held in that case that the doctrine of res judicata was inapplicable because the issues in the DOLI and the workers' compensation proceedings were not the same. It pointed out that the definitions of "occupational disease" and "injury" are not mutually exclusive; it is possible "that a worker could suffer an injury and an occupational disease arising out of a single incident." 226 Mont. at 270. Thus, a determination that a worker suffers from an occupational disease is not an adjudication that the worker did not also suffer a compensable injury. The April 16, 1993 Order in this case relied on that holding, noting: "The department cannot make a determination that claimant suffered an injury. That determination is left to the Court." The Order also relied on **Ridenour v. Equity Supply Co.**, 204 Mont. 473, 665 P.2d 783 (1983), a case which held that a claimant is entitled to elect between the Occupational Disease Act and the Workers' Compensation Act in situations coming under both acts.

In both **Poppleton** and **Ridenour** the claimants were unrepresented and did not specifically seek OD benefits. Rather, the Division of Workers' Compensation unilaterally determined that they were entitled to OD rather than workers' compensation benefits. In this case, however, a review of the administrative record suggests that petitioner, who was represented by experienced counsel, made a knowing and deliberate election to pursue benefits under the Occupational Disease Act. At the DOLI hearing his attorney stated:

...[T]his case originally started out alleging that his current condition arise, arose from a January 2, 1980 industrial injury, which was properly filed and, and for which liability was accepted by, by Plum Creek. But after receiving some correspondence from Dr. Laidlaw and seeing Juran's records, we could see that we would have a difficult or an uphill battle trying to establish that maximum healing had not occurred between 1980 and 1991, even though Mr. Motichka's condition had continued to deteriorate, you can still have maximum healing and often do over, over that period of time. So it was then decided, and we believe properly so, to make the claim for occupational disease benefits on a theory of repetitive trauma over, over a period of time.... [Emphasis added.]

Tr. at 10-11.

If this statement constituted a deliberate election to proceed under the provisions of the Occupational Disease Act, then the Court must determine whether that election can be revoked after the OD case has proceeded to hearing and determination. That issue was not addressed in either **Poppleton** or **Ridenour**.

Moreover, a review of the administrative record shows that there was never a controversy concerning injury or occupational disease. A claim for the 1980 injury was filed and accepted at the time, and was apparently one of several work-related incidents upon which petitioner premised his occupational disease claim. Nor was there a dispute as to whether petitioner suffered an occupational disease; the insurer conceded he did. Rather, the issue in the DOLI proceeding was how much of petitioner's disability was due to non-occupational factors. In **Martelli v. Anaconda-Deer Lodge County**, 50 St. Rptr. 479 (May 6, 1993), a case cited by respondent in its Motion For Reconsideration but not in the original briefs or in the Court's April 16 Order, the Montana Supreme Court held that the doctrine of collateral estoppel applies not only to ultimate issues decided in an administrative proceeding but also to those other issues which are necessary predicates to the ultimate decision. In **Martelli** the Court held that a DOLI determination that claimant could return to work in a related occupation by necessary implication amounted to a determination that the claimant was not permanently totally disabled, and therefore barred re-litigation of that issue in the Workers' Compensation Court. Thus, in any case where collateral estoppel is raised as a defense, it is important to determine the "precise issue[s]" litigated in the prior action. **Id.** No attempt to do that was made in the April 16 Order.

Ultimately, the present Judge must decide the merits of these two cases. The April 16, 1993 Order was one governing procedure. In their original briefing, the parties did not mention or discuss **Martelli, Poppleton** or **Ridenour**, nor did they address the procedural history of the DOLI proceedings or the specific issues adjudicated therein. The April 16, 1993 Order also does not indicate that the Court at that time was aware of either the statements made by petitioner's counsel at the DOLI hearing or the specific issues raised and adjudicated in that proceeding. Therefore, the Court now finds that it is appropriate to reconsider the April 16, 1993 Order. However, it makes no decision as to the preclusive effect, if any, of the DOLI decision. That matter requires further briefing by the parties and further consideration by the Court. Moreover, even if the DOLI decision were to preclude petitioner from seeking total disability benefits under the Workers' Compensation Act, it may not preclude him from seeking permanent partial disability benefits with respect to his 1980 injury.

Finally, if the DOLI decision has no preclusive effect with respect to the petition for workers' compensation benefits, then judicial review of that decision in advance of a trial on the petition will not prejudice the petitioner.

For the foregoing reasons, IT IS HEREBY ORDERED AS FOLLOWS:

1. The trial setting in the matter of **Gary D. Motichka v. Plum Creek Timber Company**, WCC No. 9303-6749, which is presently scheduled for the week of October 11, 1993, is hereby vacated and reset for the week of February 28, 1994, in Kalispell.
2. The motion to consolidate WCC No. 9301-6685 and WCC No. 9305-6749 is **denied**.
3. The stay of proceedings in WCC No. 9305-6685 is hereby lifted. The petitioner shall have until October 18, 1993, in which to serve his brief in support of his appeal from the DOLI decision. Respondent shall then have until November 3, 1993, to serve its answer brief and petitioner until November 15, 1993 to serve any reply brief. Any party wishing oral argument must make a request in writing, otherwise the matter will be deemed submitted upon filing of the briefs.
4. The parties shall file and exchange trial briefs in WCC No. 9303-6749 on or before January 24, 1994. In addition to summarizing the parties' proposed evidence, the briefs shall address the issues identified in this Order and any other legal or evidentiary issues which the parties anticipate will arise during trial. The parties are also free to file motions for summary judgment or partial summary judgment.

DATED in Helena, Montana, this 30th day of September, 1993.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Dean K. Knapton
Mr. Kelly M. Wills