

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 19

WCC No. 9303-6749

GARY D. MOTICHKA

Petitioner

vs.

PLUM CREEK TIMBER COMPANY

Respondent.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Gary Motichka (claimant) seeks a determination that he is disabled on account of a January 1, 1980 low-back injury he suffered while employed by the respondent, Plum Creek Timber Company (Plum Creek), which is self-insured. In a companion matter, this Court recently affirmed a decision of the Montana Department of Labor and Industry (DLI) determining that claimant suffers from an occupational disease related to his low-back condition and apportioning his current disability 30 percent to occupational factors and 70 percent to non-occupational factors. The disability at issue in both cases is one and the same, stemming from claimant's low back. Citing the DLI decision, and invoking the doctrine of collateral estoppel, Plum Creek has moved for summary judgment.

Since this Court has not adopted a specific rule governing motions for summary judgment, it will look to the Montana Rules of Civil procedure for guidance. ***Murer v. Montana State Compensation Mutual Insurance Fund***, 257 Mont. 434, 849 P.2d 1036 (1993). Under Rule 56(c) summary judgment may be granted when the record discloses that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Cate v. Hargrave***, 209 Mont. 265, 269, 689 P.2d 952, 954 (1984).

The factual basis of Plum Creek's collateral estoppel argument is the record of the DLI proceeding. We must determine if the decision in that proceeding precludes claimant from litigating his claim that his present disability is the result of his 1980 injury.

Claimant quit working at Plum Creek on January 2, 1991. On April 12, 1991 he filed an emergency petition with this Court, alleging that his inability to work was due to his 1980 back injury. ***Motichka v. Plum Creek Timber Co.***, WCC No. 9104-6129. Plum Creek denied that his disability was due to his injury. In September 1991, the focus of the claim was redirected in the direction of an occupational disease. The DLI was involved and on September 26, 1991, it referred claimant to Dr. James Burton for a

determination of whether claimant suffered from an occupational disease. Meanwhile, September 20, 1991, at the request of claimant, the emergency petition for workers' compensation benefits was dismissed without prejudice.

The procedural history of the DLI proceeding is set forth in this Court's Order affirming a DLI decision. ***Motichka v. Plum Creek Timber Co.***, WCC No. 9301-6685 (February 14, 1994). Briefly revisiting that history, Dr. Burton initially found that claimant was suffering from an occupational disease relating to his lower back and apportioned his disability 100 percent to the occupational disease. Based on that evaluation, the DLI issued an initial determination finding that claimant was suffering from an occupational disease. Plum Creek then requested a hearing pursuant to section 39-72-611, MCA. While that request was pending both Plum Creek and the claimant requested that Dr. Burton reevaluate the matter based on additional information. Dr. Burton ultimately concluded that claimant was suffering from an occupational disease but apportioned disability 30 percent to the occupational factors and 70 percent to non-occupational factors. After hearing, a DLI hearing examiner adopted Dr. Burton's conclusions and on appeal this Court affirmed. The DLI hearing examiner found that claimant did not suffer any job-related injuries after 1980.

While the appeal of the DLI decision was pending, claimant filed a new petition seeking a determination that his disability is the result of his 1980 injury. Plum Creek does not dispute claimant's contention that he suffered a low-back injury in 1980. A claim was filed and liability accepted. However, Plum Creek disputes claimant's contention that his current disability is caused by the 1980 injury and argues that he is collaterally stopped from pursuing his present petition.

The collateral estoppel doctrine applies in workers' compensation cases. See ***Martelli v. Anaconda-Deer Lodge Co.***, 258 Mont. 166, 852 P.2d 579. The doctrine precludes relitigation of issues already litigated in a prior suit, provided the following three elements are met:

1. The issue has been decided in a prior adjudication and is identical to the one presented.
2. A final judgment on the merits was issued.
3. The party against whom the plea is asserted was either a party or in privity with a party to the prior adjudication.

Id. at 168. It applies to litigation conducted in the administrative forum, including contested matters determined by the DLI. ***Id.***

In this case the second and third criteria are clearly met. A final decision was issued by the DLI and later affirmed by this Court. ***Motichka v. Plum Creek Timber Co.***, WCC No. 9301-6685 (February 14, 1994). The parties are the same. Thus, the focus of the parties' arguments is on the first criteria.

Plum Creek strenuously urges that the issue decided in the DLI hearing is identical to the one presented by Motichka's present petition, to wit: "What is the cause of

Petitioner's disability." Respondent's Reply Brief. Plum Creek argues that the DLI determined that Motichka's disability is caused by his occupational disease, and that the present petition amounts to an attempt to relitigate that issue.

To satisfy the first element of collateral estoppel, "the identical issue or 'precise question' must have been litigated in the prior action" thus, it is essential to any analysis that the actual issues litigated in the prior proceeding be accurately identified. **Anderson v. State**, 250 Mont. 18, 21, 817 P.2d 699 (1991). Moreover, the party against whom the estoppel may be applied must have "had a full and fair opportunity to litigate [the] critical issues" which are the basis for the estoppel. **See Dept. of Commerce v. Gallatin Dairies, Inc.**, 221 Mont. 492, 495, 719 P.2d 790 (1986). Mindful of these principles, I find that Mr. Motichka is not collaterally estopped from pursuing his present petition and that this matter should be set for trial.

While the legislature has designated the Workers' Compensation Court the original forum for resolving disputes under the Workers' Compensation Act, section 39-71-2905, MCA, it has vested the DLI with original jurisdiction over disputes under the Occupational Disease Act, at least where liability under the Act is at issue, see sections 39-72-601 to 611, MCA. The Workers' Compensation Court's jurisdiction in cases over which the DLI has original jurisdiction is limited to judicial review. Section 39-72-612, MCA. The DLI has no jurisdiction to consider any claim under the Workers' Compensation Act. **Poppleton v. Home Indemnity Co.**, 226 Mont. 267, 271, 635 P.2d 286 (1986).

The jurisdictional schism is significant because of the different elements required to prove compensability under the two acts. In both **Ridenour v. Equity Supply Co.**, 204 Mont. 473, 477, 665 P.2d 783 (1983) and **Poppleton**, 226 Mont. at 270-1, the Supreme Court held that under some circumstances a claimant may meet the requirements of both acts, and must therefore be permitted to elect between them. In **Poppleton** the Court held that the doctrine of res judicata⁽¹⁾ does not preclude a claimant from pursuing a claim for workers' compensation benefits even though her disability had already been determined by the DLI to be a result of an occupational disease. The Court held that the issues under the two acts were *not* the same:

. . . In the case at bar, it is apparent that the issues involved in claims for benefits under the Workers' Compensation Act and the Occupational Disease Act are not the same. Under the Workers' Compensation Act, an injury is defined as "a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm and such physical condition as a result therefrom and excluding disease not traceable to injury. . ." Section 39-72-119, MCA. Under the Occupational Disease Act an occupational disease is defined as "all diseases arising out of or contracted from and in the course of employment." Section 39-71-102(11), MCA. The definition of "injury" and "occupational disease" have different requirements. Although it is possible that a worker could suffer an injury and an occupational disease arising out of a single incident, it does not follow that the above-mentioned legal definitions are the same or even similar. [Emphasis added.]

Plum Creek's arguments might be easily dismissed on the basis of *Poppleton*. However, the recent Supreme Court decision in *Martelli* teaches that a more careful analysis is required. In that case the claimant petitioned the Workers' Compensation Court for a determination that he was permanently totally disabled. The insurer raised a collateral estoppel defense based on a previous determination by the DLI that claimant could return to work in a related occupation. The decision had the effect of finding the claimant to be only permanently partially disabled.⁽²⁾ The Court held:

Under the circumstances of this case, the two issues are so intertwined that to decide the issue before it, the Workers' Compensation Court would have to rehear the precise issue previously decided by the Division. The definition of permanent total disability is "a condition resulting from injury as defined in this chapter after a worker reaches maximum healing, in which a worker is unable to return to work in the worker's job pool after exhausting all options set forth in 39-71-1012, MCA." One of the options set forth in that statute is the precise issue previously resolved by the Division -- whether the worker could "return to a related occupation suited to the claimant's education and marketable skills." See § 39-71-1012(c), MCA (1987).

258 Mont. 169. Stated another way, the test of issue preclusion is whether the decision in the previous proceeding determines, either expressly or by necessary implication, that the proposition asserted in the present case is false.

Plum Creek invokes *Martelli* and argues that both *Poppleton* and *Ridenour* are inapposite because in each case the claimant's disability arose from "the same event or series of events." Respondent's Brief at 7. In *Ridenour* a single incident of grain dust inhalation triggered acute asthmatic bronchitis and accelerated the claimant's chronic obstructive pulmonary disease. In *Poppleton* the claimant was overcome by a single exposure to fumes. At the time both cases arose, occupational disease was broadly defined as "all diseases arising out of or contracted from and in the course of employment," section 39-72-102(11), MCA(1979), while injury was defined as a "tangible happening of a traumatic nature . . . resulting in either external or internal physical harm," section 39-71-119(1), MCA(1979). The definitions have since been changed. In early 1991, when Motichka ended his employment and filed an OD claim, occupational disease was defined as "harm, damage or death . . . caused by events occurring on more than a single day or work shift. . . ." Section 39-72-102(10), MCA(1989). Plum Creek's defense must be analyzed in light of the change in the law and the specific facts of this case.

Does the DLI decision by necessary implication determine that claimant's current disability is *not* the result of his 1980 injury?

Prior to the DLI hearing, Plum Creek conceded that claimant was suffering from an occupational disease. Therefore, the only issue determined by the DLI was apportionment. Section 39-72-706 (1), MCA (1989) provides:

39-71-706. Aggravation. (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease as a causative factor bears to all the causes of such disability or death.

As found by the hearing examiner, Motichka did not report any work-related injuries after 1980. However, beginning in 1985 he did seek medical treatment for back pain after engaging in various activities at home, especially in connection with a small ranching operation he and his brother operated. Under the aggravation provision cited, the hearing examiner found that petitioner's other activities were a "causative factor" in his ultimate back condition. The aggravation statute, however, did not require any specific finding that petitioner suffered any additional injuries within the meaning of the Workers' Compensation Act or that the particular activities which triggered medical care beginning in 1985 amounted to new injuries or aggravations within the meaning of the Workers' Compensation Act. While section 39-72-706 required the hearing examiner to find that the claimant's occupational disease was "aggravated by any other disease or infirmity," the section does not require that the aggravation be due to an injury. The lack of such a requirement is critical.

Under the Worker's Compensation Act the definition of an injury encompasses an unusual strain or trauma that permanently aggravates a preexisting condition. Section 39-71-119, MCA; **Belton v. Hartford Accident & Indemnity**, 202 Mont. 384, 387-389, 658 P.2d 405 (1983). Where a claimant suffers an industrial accident and his condition deteriorates over a period of several years, the insurer is liable for the deteriorated condition if it is due to everyday wear and tear. **Weigand v. Home Insurance Co.**, 232 Mont. 390, 392, 758 P.2d 260 (1988). Where a claimant is injured on the job and later suffers a non-work related injury "which is the direct and natural result of a compensable primary injury", the workers' compensation insurer for the primary injury is also liable for the subsequent one. **Rightnour v. Intermountain Insurance Co.**, 225 Mont. 187, 189, 732 P.2d 829 (1987), and **see also Guild v. Rockwood Insurance Co.**, 229 Mont. 466, 747 P.2d 217 (1987). Even where the worker suffers additional injuries to the same part of the body, it is still possible that the original work-related injury is the cause of a subsequent worsening of the condition. In **Allen v. Employers' Commercial Union & Charter Oak Fire Insurance Co.**, 246 Mont. 105, 803 P.2d 644 (1990), the Supreme Court considered the case of a worker who injured his lower back in 1973, 1974 and 1977 while operating a backhoe. The worker thereafter discontinued his work as a backhoe operator. A decade later, in 1987, he filed a petition seeking 500 weeks of permanent partial disability benefits based on the 1977 injury. His back condition in 1986 was worse than in 1976. However, based on testimony by the worker's physician that his "ongoing deterioration was natural for a person with Mr. Allen's condition," the Workers' Compensation Court concluded that the 1977 injury "only temporarily aggravated his pre-existing injury" and awarded benefits based on the 1974 injury. The Supreme Court affirmed.

After reviewing these precedents, I cannot say with certainty that DLI's apportionment under section 39-72-706 amounts to a determination that under the terms of the

Workers' Compensation Act, claimant's present condition is *not* attributable to his 1980 injury. His contentions should therefore be addressed under the specific standards of the Workers' Compensation Act.

Plum Creek's motion for summary judgment is therefore **denied**.

DATED in Helena, Montana, this 4th day of March, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

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

1. "Res judicata" refers to "situations where a cause of action or claim has been previously litigated," and is therefore considered "claim preclusion." ***Brault v. Smith***, 209 Mont. 21, 26, 679 P.2d 236 (1984). "Collateral estoppel" is a companion doctrine which precludes relitigation of specific issues which were decided in a different cause of action. ***Id.*** In a strict sense the defense in ***Poppleton*** should have been characterized by the defendant as collateral estoppel rather than res judicata.

2. The applicable statutes in ***Martelli*** were those in effect in 1987. Under section 39-71-1018, MCA (1987), the DLI was empowered to determine whether an injured worker could return to work.