IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 19

WCC No. 9911-8346

ARTHUR SCHIMMEL

Petitioner

vs.

MONTANA UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

JASPER EXPRESS, INCORPORATED

Employer.

ORDER DENYING MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT AND IN LIMINE

¶1 Petitioner (claimant) alleges he suffered an industrial injury on November 18, 1998, while employed by Jasper Express, Incorporated (Jasper). He alleges that Jasper was uninsured at the time of the accident and requests that the Uninsured Employers' Fund (UEF) be ordered to pay benefits. Jasper, which appears through counsel, moves to dismiss or for summary judgment. The UEF joins in the motions. The motions are **denied**.

Facts

I.

¶2 The petition, *inter alia*, alleges that claimant was employed under a vehicle equipment lease agreement as a truck driver for Jasper, a Washington corporation, and that he was injured in Missoula County, Montana, while loading a truckload of posts. At least for purposes of the present motion, those facts are not at issue.

¶3 In addition, Jasper's motion is supported by three documents, as follows:

- findings of fact and conclusions of law in *Jasper Express, Inc. v. Aurthur Schimmel and Jane Doe Schimmel,* Washington Superior Court for Spokane County, Cause No. 99-2-05398-7 (December 15, 1999).
- Affidavit of Lon Jasper dated February 29, 2000.
- Lease agreement between Arthur Schimmel and Jasper Express, Inc. for Used 1973 Peterbilt truck tractor and 1988 Fruehauf truck trailer dated September 16, 1998.

- Agreement entitled "lease of motor vehicle equipment with driver" between Jasper Express, Inc. and Arthur Schimmel Sr. dated September 16, 1998.

Claimant does not contest the authenticity of any of these documents.[(1)]

¶4 Jasper also refers to testimony taken from an April 9, 1999 deposition of claimant. The deposition has not been filed with the Court and will not be considered.[(2)]

II.

¶5 The leases between claimant and Jasper form a lease/lease-back arrangement. Jasper owned the Peterbilt tractor and the Fruehauf trailer leased to petitioner in the first lease agreement. Under the lease agreement, claimant leased the tractor and trailer from Jasper for two years for weekly payments of $278.17. However, the agreement specified that at the end of the two-year lease claimant could purchase the tractor and trailer for an additional payment of $1.32 due one week after the final lease payment.

¶6 Under the second lease agreement, claimant agreed to furnish his driving services and the leased equipment exclusively to Jasper "yearly from the date of . . . execution" of the agreement. (¶ 4.) However, the agreement was terminable upon 30-day's notice by either party. (*Id.*) As pertains to the present case, the agreement designated claimant an independent contractor and provided that the agreement "shall be interpreted according to the laws of the State of Washington." (¶ 27.) It also provided that claimant secure workers' compensation insurance coverage in Washington and indemnify Jasper for any workers' compensation losses in the event he failed to do so. (¶¶ 11 and 12.)

¶7 The affidavit of Lon Jasper, which is not controverted by claimant, establishes that of 17,754 miles driven by claimant for Jasper only 3,238 were in Montana. It further establishes that claimant never picked up or delivered goods in Montana; Montana was just a state he drove through.[(3)]

¶8 The Washington Superior Court decision finds that petitioner was personally served with a summons and complaint and that under the equipment lease agreement dated September 16, 1999, he was an independent contractor. The decision notes the contractual provision requiring claimant to maintain workers' compensation insurance and for him to indemnify Jasper if he did not. The final conclusion of law then provides that Jasper may apply for a judgment for amounts Jasper is required to pay on account of claimant's failure to provide workers' compensation coverage.

¶9 In his answer brief, claimant does not deny he was served with process in the Washington action or the authenticity of the Court decision. He does attack it as an attempt to subvert the current petition:

> After Petitioner Schimmel had filed for a hearing, Jasper Express, Inc. filed a case against him in the State of Washington. Knowing full well that Petitioner was totally

> disabled, had absolutely no funds, and in no way could defend and incur the cost of defending a cause, arrogantly proceeded to obtain a purported Judgment from Washington. . . .

(Petitioner's Response to Motions by Jasper Express, Inc. at 2.) Initially, there is nothing "purported" about the Washington decision, at least insofar as presented in this Court. The decision is certified and petitioner presents no evidence that it is not authentic. Second, claimant does not present any evidence that the case was filed after this proceeding had commenced. Moreover, the Washington decision indicates Washington process was served on claimant at least 60 days prior to December 15, 1999 (Finding 3), which was **prior** to the filing date of the present petition (November 1, 1999). Third, the claimant's financial ability to defend will not shield him from a Washington judgment and has not precluded him from securing competent representation in Montana. I find his comments inflammatory, not helpful.

Discussion

A. *Res Judicata*

¶10 Claimant argues that the Washington decision is *res judicata* or collateral estoppel as to claimant's entitlement to workers' compensation because it determines that claimant is an independent contractor. Both *res judicata*, sometimes called claim preclusion, and collateral estoppel, sometimes called issue preclusion, preclude relitigation of matters previously litigated. *Scott v. Scott,* 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997). For the doctrine of *res judicata* to apply, four elements must be satisfied, as follows:

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

Parini v. Missoula County High School, Dist. No. 1, 284 Mont. 14, 23, 944 P.2d 199, 204 (1997). For collateral estoppel to apply, three elements must be satisfied:

> 1) the identical issue raised has been previously decided in a prior adjudication;
>
> 2) a final judgment on the merits was issued in the prior adjudication; and
>
> 3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication.

Fadness v. Cody, 287 Mont. 89, 96, 951 P.2d 584, 588 (1997).

¶11 As shown by the itemization of elements, neither *res judicata* nor collateral estoppel apply unless the issue adjudicated in the prior action is identical to the issue raised in the present one. As shown by the Washington Court's decision, the issue in the Washington

action was breach of a contract designating claimant an independent contractor. The Court found that he breached a contractual provision requiring him to secure workers' compensation insurance. This action is not a contract action and does not rely on the parties' contract, rather it relies on substantive Montana law governing employment relationships and requiring workers' compensation coverage. Parties cannot evade the substantive requirements of Montana's Workers' Compensation Act by their contracts. Section 39-71-409, MCA (1997), provides, "No agreement by an employee to waive any rights under this chapter for any injury to be received shall be valid." Whether claimant was an employee or an independent contractor is governed by substantive provisions of the Workers' Compensation Act, specifically section 39-71-120, MCA. The parties' contractual designation of claimant as an independent contractor is neither conclusive nor entitled to deference. *Schrock v. Evans Transfer and Storage,* 225 Mont. 348, 351, 732 P.2d 848, 850 (1987).

¶12 I therefore find and hold that the issue raised herein regarding the claimant's employment status under the Montana Workers' Compensation Act is not identical to the issue raised in the Washington action. Since the identity of issues test is not met, neither *res judicata* nor collateral estoppel are applicable. I need not address the other factors.

B. Exhaustion of Remedies

¶13 Jasper next argues that the present petition is precluded by the claimant's failure to exhaust his Washington remedies. However, only this Court has jurisdiction over Montana workers' compensation claims. There are no Washington remedies available.

C. Washington Contract Law

¶14 In an alternative argument, Jasper asserts that should claimant's petition not be dismissed then this Court should apply Washington law since the parties contractually agreed Washington law should apply. As set out before, this is not a contract action but one for enforcement of rights specifically created and governed by Montana law[(4)]. The Montana Workers' Compensation Act requires application of Montana law.

D. Montana Employment Duties

¶15 Finally, Jasper argues that the petition must be dismissed "because his employment duties were neither primarily carried out nor controlled within this state" as required by section 39-71-118(10), MCA (1997).[(5)] (motions and brief to dismiss; for summary judgment; and in limine re: choice of law at 3.) Jasper cites this Court's decision in *Sandoval v. Uninsured Employers' Fund and Jackson,* 1999 MTWCC 33. *Sandoval* is inapposite. The test fashioned in that case was whether the claimant spent more time in Montana than in any other state. As a factual matter, he did not. *Sandoval v. Uninsured Employers' Fund and Jackson*, 1998 MTWCC 76, ¶ 14. In this case the evidence does not establish whether

claimant spent more time in any state other than Montana, only that he drove less than 50% of his total miles in Montana.

¶16 Moreover, the Montana Workers' Compensation Act has a separate provision for interstate common carriers. Section 39-71-117(4), MCA (1997), provides:

> (4) An interstate or intrastate common or contract motor carrier doing business in this state who uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:
>
> (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3); or
>
> (b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation insurance on the drivers in Montana both at the inception of employment and during all phases of the work performed.

ORDER

¶17 The motions to dismiss, for summary judgment and in limine are **denied**.

DATED in Helena, Montana, this 4th day of April, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Kevin Braun
Mr. Dean K. Kapton
Submitted: March 28, 2000

1. Lon Jasper's affidavit authenticates the lease agreements in any event.

2. Jasper states in its reply brief that "Jasper would seek publication of that deposition in the event" claimant denies the truth of the excerpts set forth in the reply brief. (employer/respondent's reply brief at 1.) Jasper, however, did not forward the deposition to the Court for filing and it is not the Court's responsibility to solicit it. Moreover, the excerpts, even if true, would not change the ruling on Jasper's motions.

3. However, the Washington Superior Court's Findings state the claimant is currently a Montana resident. (¶ 2.)

4. *Pust v. Union Supply Co.*, 561 P.2d 355 (Colo. 1970), cited by Jasper, is inapposite. *Pust* was a products liability case.

5. The subsection provides:

> (10) For purposes of this section, an "employee or worker in this state" means:
>
> (a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;
>
> (b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;
>
> (c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or
>
> (d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:
>
> (i) nonresident employees are hired in Montana;
>
> (ii) nonresident employees' wages are paid in Montana;
>
> (iii) nonresident employees are supervised in Montana; and
>
> (iv) business records are maintained in Montana.