

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 26

WCC No. 9612-7667

RICHARD WARE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HAGEMAN CONSTRUCTION

Employer.

ORDER DENYING DEFENSE OF *RES JUDICATA*

Summary: Petitioner seeks attorney's fees and penalty relating to temporary total disability benefits awarded by the WCC in a prior case. He did not seek attorney's fees and penalty on that prior petition. Respondent insurer argued petitioner's present request was barred by the doctrine of res judicata.

Held: The doctrine of res judicata bars any subsequent action between the same parties upon the same claim or demand. *Western Montana Products Ass'n v. Hydroponics*, 147 Mont. 156, 161, 410 P.2d 936, 939 (1966). A companion doctrine -- collateral estoppel -- bars any subsequent action between the same parties "as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different." *Id.* Relying on *Loney v. Milodragovich*, Dale & Dye, 273 Mont. 506, 905 P.2d 158, 161 (1995), the insurer argued collateral estoppel extends to other matters "the party had an opportunity to litigate." WCC holds that the "opportunity to litigate" doctrine applies only to issues that are "inseparable" from the issues actually litigated. Where the rules of the WCC contain no requirement that requests for attorney's fees and penalty be joined with substantive claims for benefits, the present petition is not barred.

Topics:

Defenses: Collateral Estoppel. Where the rules of the WCC do not require that requests for attorney's fees and penalty be joined with substantive claims for benefits, res judicata or collateral estoppel do not prevent claimant from claiming,

in a second petition, attorney's fees and penalty relating to benefits awarded on an earlier petition.

Defenses: Res Judicata. Where the rules of the WCC do not require that requests for attorney's fees and penalty be joined with substantive claims for benefits, res judicata or collateral estoppel do not prevent claimant from claiming, in a second petition, attorney's fees and penalty relating to benefits awarded on an earlier petition.

Petitioner, Richard Ware (claimant), seeks attorney's fees and a penalty with respect to medical benefits the respondent, State Compensation Insurance Fund (State Fund), initially denied but later agreed to pay. He also seeks attorney's fees and a penalty with respect to temporary total disability benefits awarded by this Court in a prior proceeding, WCC No. 9508-7361. In its response, the State Fund affirmatively alleges that the requests for attorney's fees and a penalty are barred by the doctrine of *res judicata*. The Court ordered the defense briefed. Having received briefs from both parties, the issue is deemed submitted for decision.

Factual Background

The facts pertinent to the State Fund's defense are contained in the Court file in the prior proceeding, *Richard Ware v. State Compensation Ins. Fund*, WCC No. 9508-7361 (*Ware I*). I take judicial notice of the file and the proceedings reflected therein. Rule 201, Mont. R. Evid.

As reflected in the Court's Findings of Fact, Conclusions of Law and Judgment entered May 15, 1996, in *Ware I*, the claimant suffered an industrial injury to his shoulders in early November 1992. He continued to work at his time-of-injury job for another month, when he then moved to Missouri. After his move to Missouri, he did some light-duty carpentry and odd jobs but continued to experience pain in both shoulders. In January 1995, claimant's treating physician referred claimant to an orthopedic surgeon who, after examining claimant, recommended shoulder surgery.

Presented with the surgical recommendation, the State Fund requested an independent medical examination (IME). The IME was conducted on April 1995. The IME physician did not feel surgery was necessary and recommended continued conservative treatment, including physical therapy.

The claimant's treating physician followed the IME recommendation for further conservative treatment but claimant's condition did not improve. Surgery was again recommended and finally, in late August or early September 1995, the State Fund authorized the surgery. Surgery was performed September 19, 1995.

In *Ware I* the petitioner sought temporary total disability benefits. The surgery was not at issue. He did not request the Court to award either attorney fees or costs.

Following the hearing in *Ware I*, this Court awarded claimant part but not all of the temporary total disability benefits he sought. He appealed that decision on June 12, 1996. The appeal is still pending.

Discussion

The State Fund argues that the current petition should be dismissed because claimant's request for attorney's fees and costs should have been joined with his other claims in *Ware I*. It urges that the doctrine of *res judicata* therefore applies.

The doctrine of *res judicata* bars any subsequent action between the same parties upon the same claim or demand. *Western Montana Products Ass'n. v. Hydroponics*, 147 Mont. 156, 161, 410 P.2d 936, 939 (1966). Four criteria must be met: the parties or their privies must be the same; the subject matter must be the same; the issues must be the same and relate to the same subject matter; and the capacities of the parties must be the same in reference to the subject matter and issues. *Greenwood v. Steve Nelson Trucking, Inc.*, 270 Mont. 216, 219, 890 P.2d 765, 767 (1995). A companion doctrine -- collateral estoppel -- bars any subsequent action between the same parties "as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different." *Western Montana Products*, 147 Mont. at 161, 410 P.2d at 939 (1966).

Quoting from *Loney v. Milodragovich, Dale & Dye, P.C.*, 273 Mont. 506, 905 P.2d 158, 161 (1995), the State Fund argues that the doctrines also extend to other matters "the party has already had an opportunity to litigate." (State Fund's Brief Regarding *Res Judicata* at 4.) However, a careful reading of *Loney* shows that the "opportunity to litigate" language refers to issues that are "inseparable" from the issues actually litigated. In that case the defendant law firm had previously sued Mr. Loney for attorney fees. Loney defaulted and judgment was entered against him. Later he brought the action which was the subject of the cited appeal. In that action he requested the district court to declare the judgment void because any indebtedness to the law firm had been discharged in bankruptcy. Noting that discharge in bankruptcy is an affirmative defense which Loney was required to plead in the prior action, the Supreme Court held that Loney had the opportunity to litigate the issue in the prior action and was therefore barred from raising it in the second action. In reaching its conclusion, it noted: "Whether the unpaid attorney's fees were discharged in bankruptcy is **inseparable** from the issue presented in the prior proceeding, namely, whether Loney owed the Firm attorney's fees." 905 P.2d at 161.

My conclusion that the "opportunity to litigate" language employed by the Supreme Court is limited to issues which are "inseparable" from the issues in the first case is reinforced by the Supreme Court's more recent decision in *State ex rel. Lovins v. Toole County*, 924 P.2d

693 (Mont. 1996). In that case, the Court held that a district court decision granting Toole County summary judgment on *res judicata* grounds was in error. The plaintiff in that action, Floyd Lee Lovins (Lovins), had brought a previous action against the county to prohibit a proposed lease between the county and a private nonprofit corporation for the operation of a hospital. In that prior action the district court entered a writ of prohibition against the proposed lease. It also noted that proposed "acquisition of over \$500,000 in debt for bond repayment for construction of the clinic 'would require a vote of the Toole County electorate to approve the indebtedness.'" 924 P.2d at 696. Upon the county's motion for reconsideration of the decision in that first action, the district court altered its conclusion regarding the bond and entered judgment holding that a vote was not required with regard to the bond. *Id.*

In the second action, which was the subject of the appeal cited in the preceding paragraph, Lovins sought to bar the county from borrowing \$1,700,000 unless voter approval was obtained. Relying on the prior district court holding that no vote was required, the county moved for summary judgment on *res judicata* grounds. The district court granted summary judgment and Lovins appealed.

On appeal the Montana Supreme Court held that the district court's holding in the first case was not *res judicata*. Citing the Restatement (Second) of Judgement, § 27, cmt. h (1982), the Supreme Court held that *res judicata* only extends to issues which are necessary to the resolution of the case and that it does not extend to *dictum*. Pointing out that under the pleadings in the first case the election requirement was not before the district court and that consideration of the issue was unnecessary to the resolution of Lovins' claim in that case, the Supreme Court held that the prior determination concerning the election requirement was *dictum* and that Lovins was not barred from litigating the issue in his second action. The Supreme Court did, however, affirm the summary judgment but on other grounds.

In this case claimant did not request attorney fees or a penalty in his first petition. Those matters were not addressed in the first decision and were not issues essential to that first decision. The rules of the Workers' Compensation Court contain no requirement that requests for attorney fees and penalties be joined with substantive claims for benefits. *Compare with Loney* (holding that discharge by bankruptcy must be affirmatively pleaded in an action to recover on a debt). The claimant's petition in the present case is therefore **not** barred.

SO ORDERED.

DATED in Helena, Montana, this 25th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Charles G. Adams

Submitted: March 28, 1997