

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 102

WCC No. 9508-7376

BRIAN OSTWALD,

Petitioner,

vs.

PLUM CREEK MANUFACTURING,

Respondent/Employer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment alleging that prior Department of Labor Order of Determination of occupational disease precluded his petition alleging injury of low back.

Held: Neither *res judicata* nor collateral estoppel bar claim for workers' compensation benefits where Workers' Compensation Act and Occupational Disease Act are not the same. Prior finding that claimant suffered from an occupational disease does not preclude a determination in this proceeding that he suffered a compensable injury aggravating his back condition. Summary judgment denied.

Topics:

Defenses: Collateral Estoppel. Although DOL previously found claimant to suffer from an occupational disease, neither *res judicata* nor collateral estoppel bar his claim for workers' compensation benefits where Workers' Compensation Act and Occupational Disease Act are not the same. Court may determine in this proceeding that claimant suffered a compensable injury aggravating his back condition.

Defenses: Res Judicata. Although DOL previously found claimant to suffer from an occupational disease, neither *res judicata* nor collateral estoppel bar his claim for workers' compensation benefits where Workers' Compensation Act and Occupational Disease Act are not the same. Court may determine in this proceeding that claimant suffered a compensable injury aggravating his back condition.

Injury and Accident: Aggravation: Occupational Disease. Although DOL previously found claimant to suffer from an occupational disease, neither *res judicata* nor collateral estoppel bar his claim for workers' compensation benefits where Workers' Compensation Act and Occupational Disease Act are not the same. Court may determine in this proceeding that claimant suffered a compensable injury aggravating his back condition.

Occupational Disease: Subsequent Injury. Although DOL previously found claimant to suffer from an occupational disease, neither *res judicata* nor collateral estoppel bar his claim for workers' compensation benefits where Workers' Compensation Act and Occupational Disease Act are not the same. Court may determine in this proceeding that claimant suffered a compensable injury aggravating his back condition.

The petitioner, Brian Ostwald, alleges that on November 14, 1994, he injured his low back in an industrial accident. Plum Creek denied his claim for compensation and sought evaluation of Ostwald under the Occupational Disease Act. Ostwald was thereafter examined by a physician designated by the Department of Labor and Industry. The physician determined that he was in fact suffering from an occupational disease. Neither Plum Creek nor Ostwald requested a second examination and on March 14, 1995, the Department issued an order of determination finding that Ostwald "is suffering from an Occupational Disease and is entitled to benefits under the Occupational Disease Act." Since neither party requested a hearing, the order became final 20 days thereafter.

The present petition for workers' compensation benefits was filed with the Court on August 29, 1995. Plum Creek now moves for summary judgment. It contends that the Court lacks jurisdiction to hear the petition and that the Department determination is *res judicata* as to any claim for workers' compensation benefits. The motion is **denied**.

DISCUSSION

1. Jurisdiction

The Court plainly has jurisdiction over Ostwald's claim for workers' compensation benefits. § 39-71-2905, MCA. Indeed, it has *exclusive* jurisdiction over benefit disputes arising under the Workers' Compensation Act: The Department had no jurisdiction to adjudicate the workers' compensation claim. *Poppleton v. Rollins, Inc.*, 226 Mont. 267, 271, 735 P.2d 286, 289 (1987). As far as Ostwald's request that the Court also determine that he "does not suffer from an occupational disease" (Petition for Hearing at 2), he acknowledges in his brief that this Court has no jurisdiction to make such determination and indicates that he wishes "to delete that request." (Petitioner's Response to Respondent's Motion for Summary Judgment at 2.)

2. *Res Judicata*

For the doctrine of *res judicata* to apply:

- 1) the parties or 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 relation to the subject matter and issues between them. [Emphasis added.]

Chagnon v. Tilleman Motor Co., 259 Mont. 21, 28, 855 P.2d 1002, 1006 (1993). A companion doctrine -- collateral estoppel -- "precludes relitigation of issues actually litigated and determined in [a] prior suit regardless of whether it was based on the same cause of action as the second suit." *Martelli v. Anaconda-Deer Lodge County*, 258 Mont. 166, 168, 852 P.2d 579, 580 (1993) (quoting from *Lawlor v. National Screen Service*, 349 U.S. 322, 326 (1955) (brackets in original)). The doctrine is often referred to as issue preclusion and requires, as does *res judicata*, that the issue decided in the prior action be identical to the issue presented in the instant case. *Id.*

The present case is very similar to the situation presented in *Poppleton v. Rollins, Inc.*, 226 Mont. 267, 735 P.2d 286 (1987). In that case the claim was treated as one for occupational disease even though the claimant did not expressly request that treatment. The claimant was awarded occupational disease benefits by the Division of Workers' Compensation. Claimant then pursued a workers' compensation claim. The insurer interposed a defense of *res judicata* based on the Department's final determination awarding occupational disease benefits. The Supreme Court rejected the defense, holding that the issues in an occupational disease case and a workers' compensation case are 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 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.

Id. at 270, 735 P.2d at 288.

Plum Creek argues that *Poppleton* and other pre-1987 cases allowing an election of remedies, e.g. *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 665 P.2d 783 (1983), are no longer good law because the 1987 Montana Legislature amended the injury and occupational disease definitions to make them mutually exclusive. Thus, there can be no election as between the two acts.

What Plum Creek overlooks, however, is that Ostwald may well be suffering from a pre-existing occupational disease but have suffered a compensable industrial accident which aggravated his disease. The issue before the Department was whether he suffered from an occupational disease. The Department did not determine, and was not required to determine, exactly when and how the disease arose, or whether it was aggravated by an industrial accident.

Indeed, the report prepared by the Occupational Disease Panel physician who examined Ostwald is not inconsistent with a finding that Ostwald suffers a preexisting occupational disease which was then aggravated by an injury occurring on November 14, 1994. Dr. Randale Sechrest, an orthopedic surgeon, recorded in his report that Ostwald "first noted some symmetric low back pain without radiculopathy, approximately **one month prior to his injury of 11/14/94.**" (Ex. 5 to Brief in Support of Motion for Summary Judgment, emphasis added.) In addressing the Department's question as to whether Ostwald was suffering from an occupational disease, Dr. Sechrest replied:

[T]he patient is suffering from a disease that is a result of his employment. We feel that there is a direct relationship between **the conditions under which the work is performed and his occupational disease.** [Emphasis added.]

(*Id.* At 2.) Nothing in Dr. Sechrest's report suggests that he rested his finding of an occupational disease solely on the events which Ostwald alleges occurred on November 14, 1994. The history he recorded regarding onset of back pain one month prior to an **injury** suggests otherwise.

Moreover, the 1987 redefinition does not render the two Acts mutually exclusive. Section 39-71-119, MCA (1993), defines injury as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

- (a) internal or external physical harm to the body;
 - (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
 - (c) death.
- (2) An injury is caused by an accident. An accident is:
- (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm. [Emphasis added.]

Section 39-72-102(10), MCA (1993), defines occupational disease as follows:

(10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

Under these definitions, the Workers' Compensation Act provides coverage for a disease which is caused by an industrial accident, § 39-71-119(4), MCA (1993), and the Occupational Disease Act covers occupational diseases that are caused by "events occurring on more than a single day or work shift" and could thus encompass a situation where long-term micro trauma and an industrial accident combine to produce the claimant's condition.

Thus, the issue decided by the Department is not so intertwined with the issue presented by the petition in this case that they must be deemed the same. *Compare Martelli v. Anaconda-Deer Lodge County*, 258 Mont. 166, 852 P.2d 579 (1993) (holding that whether or not a claimant can return to work, which was the issue determined in a Department Rehabilitation Panel proceeding, was the same issue presented to the Workers' Compensation Court in a petition seeking permanent total disability) with *Grenz v. Fire & Casualty of Connecticut*, 255 Mont. 121, 841 P. 2d 494 (1992) (A prior adjudication holding that claimant's current condition was not caused by a 1984 injury is not *res judicata* as to a causal connection between his condition as a subsequent compensable event or events).

ORDER

IT IS HEREBY ORDERED the respondent's motion for summary judgment is **denied**. The trial setting of this case for the week of December 11, 1995, is confirmed.

Dated in Helena, Montana, this 5th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Chas. C. Dearden

Mr. Kelly M. Wills

Submitted: December 1, 1995