STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

WOJCIECH RUSEK)
)
VS.) W.C.C. 2008-07746
)
WOLVERINE JOINING TECHNOLOGIES)

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the dismissal of his petition by the trial judge by application of the doctrine of *res judicata*. The employee's petition to review alleged that the decree entered in W.C.C. No. 2005-07770, which suspended the payment of his weekly benefits due to his refusal to attend a physical examination requested by the employer, was procured by fraud. After reviewing the record in this matter, we find no error in the trial judge's ruling and therefore deny the employee's appeal.

The employee sustained a work-related injury to his low back in January 2001, which eventually rendered him partially disabled on June 6, 2001. On December 7, 2005, the employer filed a petition to review alleging that the employee refused to submit to a physical examination scheduled by the employer pursuant to R.I.G.L. § 28-33-34. The evidence reflected that the employer had scheduled the examination on two (2) occasions and the employee did not appear for either appointment. As a result, on February 1, 2006, a pretrial order was entered suspending the employee's weekly benefits. The employee filed a claim for trial.

While the trial was pending, the employee, who was *pro se*, filed a motion requesting that the trial judge, Associate Judge Robert E. Hardman, recuse himself from hearing the matter because he had allegedly provided legal representation to the insurer prior to his appointment to the bench. The motion was denied. During the course of the trial, the employer made appointments for the employee to be examined on two (2) more occasions, and again, the employee did not attend. On September 19, 2006, a decree was entered affirming the pretrial order suspending the employee's weekly benefits for refusal to attend a physical examination. There was no appeal filed from this decree.

On September 4, 2007, the employee filed a petition to review, W.C.C. No. 2007-05564, alleging that the decree in W.C.C. No. 2005-07770 was procured by fraud because Judge Hardman had allegedly represented the insurer prior to his appointment to the bench and he refused to recuse himself from the matter. After the denial of the petition at the pretrial conference, the employee claimed a trial. On February 28, 2008, the trial judge, Chief Justice George E. Healy, Jr., entered a decree denying and dismissing the petition. He found that the allegations in the petition had been raised and decided previously in W.C.C. No. 2005-07770 and, therefore, the petition was barred by the doctrine of *res judicata*. No appeal was taken from this decree.

On December 4, 2008, the employee, *pro se*, filed the present petition containing the same allegation as in W.C.C. No. 2007-05564. The matter came before Chief Judge Healy, who denied the petition at the pretrial conference and again after trial, on the grounds that it was barred by the doctrine of *res judicata*. The employee filed a claim of appeal.

Subsequent to the employee filing his reasons of appeal *pro se*, attorney Keven A. McKenna entered his appearance on behalf of Mr. Rusek and appeared at oral argument. In his

reasons of appeal, the employee simply argues that the decree entered by Judge Hardman was procured by fraud because of the alleged relationship he previously had with the insurer. He fails to address how the trial judge in the present matter committed error in denying his petition on the grounds of *res judicata*. Our review of the record leads to the conclusion that the trial judge was correct in dismissing the petition.

When a court of competent jurisdiction enters a final judgment on the merits of a controversy which is conclusive as to the rights of the respective parties, the doctrine of *res judicata* operates to bar any subsequent action involving the same issue or cause of action and the same parties. In workers' compensation cases, the Rhode Island Supreme Court has held that the doctrine will only be applied with regard to issues actually raised and decided in the prior action. DiVona v. Haverhill Shoe Novelty Co., 85 R.I. 122, 126, 127 A.2d 503, 506 (1956).

The petition filed in the matter currently before the panel is exactly the same as the petition filed by the employee in W.C.C. No. 2007-05564. The trial judge in the present matter, who coincidentally presided over the previous case, noted in his bench decision that the employee presented the same evidence, legal argument and theory as he did in the prior matter. We find no reason why the doctrine of *res judicata* should not be applied in this situation.

The employee's attorney indicated at oral argument that his client is now willing to submit to a physical examination scheduled by the employer, however, his remedy is not at the appellate level. We would suggest that he forward a request to the insurer that the examination be scheduled. If the request is denied, the employee may file a petition requesting that the court order an examination to be scheduled. Once the employee submits to the examination, he may request reinstatement of his benefits.

Based upon our review of the record, we find no error on the part of the trial judge. Consequently, the employee's appeal is denied and dismissed and the decision and decree of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Connor and Ferrieri, JJ. concur.

ENTER:

____
Olsson, J.

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Connor, J.

____
Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and orders contained in a decree of this Court entered on April 14, 2009 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Connor, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Keven A. McKenna, Esq., and Lauren Motola-Davis, Esq., on

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