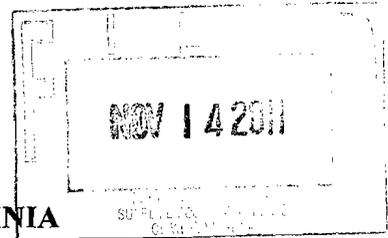


No. 11-0397



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KATY ADDAIR, Administratrix of the Estate of
Gary Addair; DAVID FARLEY; DEBORAH STOLLINGS, et al.

Appellants/Plaintiffs,

v.

LITWAR PROCESSING COMPANY, et al.

Appellees/Defendants.

Circuit Court of Wyoming County
Civil Action No. 04-C-252

**AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE DEFENSE
TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT
OF APPELLEES AND URGING AFFIRMANCE**

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INTRODUCTION

The Defense Trial Counsel of West Virginia (“DTCWV”) respectfully submits this amicus brief asking the Court to give preclusive effect in deliberate intent actions to final non-compensability decisions reached during workers’ compensation proceedings. In 1998, this Court held:

Under W.Va. Code, 23-2-5(d) [1986], in the absence of a final ruling by the Workers’ Compensation Commissioner, a trial court may find an employer in default under the Workers’ Compensation Act. However, if the Commissioner has made a final ruling that an employer is in default, then the Commissioner’s ruling is binding upon a trial court. The Commissioner’s ruling may not be collaterally attacked in a subsequent proceeding considering the same issue, and the employer’s proper remedy is to seek review of the ruling through the appellate process established by W.Va. Code, 23-2-17 [1990].

State ex rel. Frazier v. Hrko, 203 W. Va. 652, 510 S.E.2d 486 (1998) syllabus point 2.

The consistent and predictable application of West Virginia law is of great interest to DTCWV members. Although the Court in *Frazier* specifically reserved the issue presented on this appeal – i.e. the preclusive effect of a final non-compensability determination – DTCWV believes that principles of consistency and predictability support affirmance of the lower court’s decision here. This amicus is therefore limited to discussing how this Court has treated related issues in the past and why DTCWV members believe the Court’s prior treatment of these issues should inform its decision in this appeal.¹

¹ No counsel for any party authored this brief in whole or in part, nor did any counsel or party make a monetary contribution (direct or indirect) towards the preparation or submission of this brief. In addition, no other person or entity made any monetary contribution towards the preparation or submission of this brief. Counsel for DTCWV authored the brief solely as part of their service to the organization.

STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil litigation in West Virginia. The Defense Trial Counsel of West Virginia is an affiliate of the Defense Research Institute (DRI), a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members also on occasion represent plaintiffs in civil litigation.

Although it does not routinely file amicus briefs, the Defense Trial Counsel of West Virginia is interested in the issue before the Court regarding the preclusive effect of non-compensability determinations in subsequent deliberate intent actions because of DTCWV's general position that consistent and predictable application of the law is in the best interest of its members and of the civil justice system. For example, in *McMahon v. Advance Stores Co.*, ___ W.Va. ___, 705 S.E.2d 131 (2010), DTCWV filed an amicus urging the Court to apply W. Va. Code §46A-6-108(a) in a manner consistent with decisions of other courts applying similar statutory provisions. In *State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), DTCWV submitted a brief asking the Court to apply West Virginia's class action rules in a fashion similar to equivalent federal rules. Likewise, in *Hawkins v. Ford Motor Co.*, 211 W. Va. 487; 566 S.E.2d 624 (2002), DTCWV submitted a brief in support of a manufacturer's assertion that the plain language of West Virginia's Unfair Trade Practices Act did not apply to self-insured entities. All three positions were ultimately adopted by the Court.

The DTCWV Board of Governors has authorized the filing of an *amicus* brief on behalf of the DTCWV's membership.

STATEMENT OF EXPERIENCE

Members of the DTCWV are routinely involved in both administrative proceedings (such as workers' compensation claims) and in subsequent civil actions related to those administrative proceedings, including "deliberate intent" cases brought under West Virginia Code § 23-4-2. Our members' experience is that all parties benefit from consistent and predictable rules of claim and issue preclusion. In addition, our members are often called on to assess the effect of prior administrative findings in light of this Court's decisions on related topics. DTCWV believes the rules should be applied in a manner that is both consistent and ultimately predictable. In this case, DTCWV believes upholding the lower court's finding on the preclusive effect of non-compensability determinations in subsequent deliberate intent actions furthers that end.

DISCUSSION

Under West Virginia's deliberate intent statute, West Virginia Code § 23-4-2, an employee must prove (as one part of the five-part statutory test) that the employee "suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition." W.Va.Code § 23-4-2(d)(2)(ii)(E). The issue in this appeal centers on whether an employee can, as a matter of law, prove this element when his claim for benefits under the West Virginia Workers' Compensation Act (the "Act") was previously denied as not being "compensable" under the Act.

Notably, this appeal does not present the question of how this element can be met where the employee did *not* file a workers' compensation claim. Instead, it involves the

question of whether a final finding of non-compensability under the Act by the Workers' Compensation Commission precludes the employee from later, in a deliberate intent claim, attempting to prove that his injury was, in fact, compensable under the Act. The Court has already resolved a related question as to the preclusive effect of findings by the Workers' Compensation Commission in another context while leaving the precise issue presented here for another day. DTCWV believes applying the same rules of preclusion to the issues presented on this appeal as it did in the earlier matter is in its members' interest in providing accurate and timely advice to their clients. In addition, DTCWV believes that consistent application of the rules supports DTCWV's interest in furthering the civil justice system in West Virginia.

I. THIS COURT SHOULD APPLY HERE THE SAME PRECLUSION RULES IT HAS PREVIOUSLY USED IN OTHER MATTERS INVOLVING DETERMINATIONS MADE BY THE WORKERS' COMPENSATION COMMISSION IN ORDER TO BRING CONSISTENCY AND PREDICTABILITY TO THIS AREA OF THE LAW.

Thirteen years ago, this Court directly addressed the question of the preclusive effect of unappealed Workers' Compensation Commissioner findings in *State ex rel. State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (1998), a personal injury action brought by an employee against various defendants, including his employer or employers. The Workers' Compensation Commissioner had issued final and unappealed orders declaring that the two putative employers were in default of their obligations under the Act at the time of the plaintiff's work-related injuries. *Frazier*, 203 W.Va. at 652. On appeal, the question presented was whether these findings had a preclusive effect in

the plaintiff's subsequent deliberate intent action against those employers.² The lower court had held the issue of the employers' default was for the jury. The employee sought a writ of prohibition to prevent re-litigation of that question.

This Court issued a rule to show cause and ultimately granted the writ, applying the familiar standard that the extraordinary power of a writ is limited to situations which allows the Court to "correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." *Frazier*, 203 W.Va. 657 (quoting *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979) syllabus point 1). In concluding that this stringent standard was met by the employee's challenge to the lower court's refusal to give preclusive effect to the Commissioner's findings, the Court stated:

Under W.Va. Code, 23-2-5(d) [1986], in the absence of a final ruling by the Workers' Compensation Commissioner, a trial court may find an employer in default under the Workers' Compensation Act. However, if the Commissioner has made a final ruling that an employer is in default, then the Commissioner's ruling is binding upon a trial court. The Commissioner's ruling may not be collaterally attacked in a subsequent proceeding considering the same issue, and the employer's

² As the Court explained, an employer which is not in good standing at the time of an employee's work-related injury is barred from asserting the exclusivity provisions of the Workers' Compensation Act and is further stripped of certain common-law defenses in the employee's subsequent negligence action. *Frazier*, 203 W.Va. at 659-660; *see also*, W.Va. Code § 23-2-6 (exempting employers who are not in default from liability); W.Va. Code § 23-2-8 (stating that defaulting employers are liable "for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment" and stripping defendants of certain common-law defenses).

proper remedy is to seek review of the ruling through the appellate process established by W.Va. Code, 23-2-17 [1990].

Frazier, syllabus point 2. DTCWV believes the Court's decision in *Frazier* to decide that issue under the high standard applicable to extraordinary writ proceedings demonstrates the force and breadth of its ruling on the preclusive effect of Commission findings.

In reaching that decision, the Court drew from its prior decisions regarding the preclusive effect of such administrative findings:

It is generally held that an administrative decision by a workers' compensation tribunal cannot be collaterally attacked in another tribunal. *See Matters Concluded, in Action at Law to Recover For the Same Injury, By Decision Or Finding Made In Workmen's Compensation Proceeding*, 84 A.L.R.2d 1036 (1962). *See also, Rymer v. Hagler*, 211 Cal. App. 3d 1171, 260 Cal. Rptr. 76 (Ct.App. 1989) (workers' compensation judge ruled that employer had secured workers' compensation insurance coverage; employee was collaterally estopped from challenging ruling in a civil action for damages, and employer could assert statutory immunity from suit). We believe such a rule should be adopted in West Virginia concerning final orders relating to default and in-good-standing issues by the Workers' Compensation Commissioner.

Frazier, 203 W. Va. at 661. While the Court specifically noted in *Frazier* that it was only addressing the specific issue before the Court and leaving other issues for another day, *Frazier*, 203 W.Va. at 662 n. 18 (“we decline to consider the impact on trial court proceedings of rulings by the Commissioner concerning other issues (such as whether a claimant was an employee, or whether an injury occurred in the course of employment or was otherwise compensable)”), DTCWV believes this case presents the proper vehicle for resolving the issue left open in *Frazier* and that consistency and predictability requires applying the reasoning of *Frazier* to the issues presented here.

Indeed, this Court has applied *Frazier* in other contexts in the consistent and predictable fashion urged by DTCWV here. For example, in *State ex rel. Smith v.*

Thornsbury, 214 W. Va. 228, 588 S.E.2d 217 (2003), the Court cited *Frazier* for the proposition that “the proper remedy for an employer who wishes to challenge a workers' compensation ruling concerning default issues under the Workers' Compensation Act is through the appellate process set forth in West Virginia Code § 23-2- 17.” *Smith*, 214 W.Va. at 232. With respect to the importance of the administrative procedures, the Court stated in *Smith* that, “where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.” *Smith*, 214 W.Va. at 232.

Similarly, courts in other jurisdictions have addressed the question of consistent and predictable application of similar preclusion rules. As one court put it:

[W]hen a fact is appropriately determined in one legal proceeding, it is given effect in another lawsuit in cases where such fact or facts are a vital part of the evidentiary chain necessary to be established in order to prove a cause of action. In *Oates v. Safeco Ins. Co. of America*, 583 S.W.2d 713, 719 (Mo. banc 1979), it was emphasized that the purpose of the doctrine was to prevent the same parties from relitigating issues which had been previously litigated with adverse results. See *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984).

The doctrine has been applied by Missouri courts in situations where the fact issue was raised and decided in an administrative proceeding and relitigation later attempted in a circuit court action. In *Hines v. Continental Baking Co.*, 334 S.W.2d 140, 144-46 (Mo.App. 1960), the court held that an unappealed final award of the then named Industrial Commission in a workmen's compensation case which held that an employee did not sustain an accidental injury arising out of or in the course of his employment was a bar to his asserting it in any other proceeding in the future that he did, and that such adjudication of the Commission upon a fact issue “as effective and impregnable to collateral attack as a judgment of a court.” Twenty-two years later, in *Butcher v. Ramsey Corp.*, 628 S.W.2d 912, 914 (Mo.App. 1982), the court of appeals under a similar factual and legal situation present in *Hines* specifically held “the unappealed final administrative determination in a workmen's compensation proceeding upon a fact issue within the jurisdiction of the

administrative body is not subject to collateral attack and constitutes a bar to relitigation of the same fact issue in a subsequent common law action.”

Bresnahan v. May Dep't Stores Co., 726 S.W.2d 327, 329-330 (Mo. 1987). The holdings of the cases discussed in *Bresnahan* are fully consistent with this Court's holding in *Frazier* and support the lower court's decision here.

CONCLUSION

In light of this Court's decision in *Frazier* and in its other cases giving preclusive effect to administrative determinations, DTCWV believes this Court should affirm the lower court's decision on the preclusive effect of the non-compensability determination.

Dated this 14th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Todd A. Mount, hereby certify that, on this 14th day of November, 2011, I have placed a true and exact copy of the foregoing MOTION OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE, along with the proposed AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE in the United States Mail, postage properly paid, in envelopes addressed as follows:

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