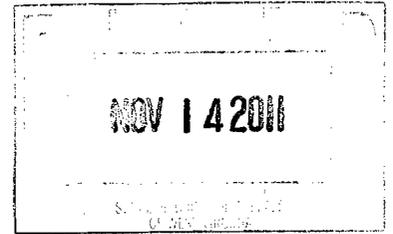


IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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



Petitioners/Plaintiffs,

v.

Docket Number: 11-0397

**LITWAR PROCESSING COMPANY, LLC;
VIRGINIA CREWS COAL COMPANY; et al.,**

Respondents/Defendants.

From the Circuit Court of Wyoming County, West Virginia
Civil Action No. 04-C-252

**RESPONSE BY STANDARD LABORATORIES, INC.
TO PETITIONERS' SUPPLEMENTAL BRIEF**

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I. SUMMARY OF SUPPLEMENTAL ARGUMENT

In light of the Court's directive that the "reiteration of prior filings is highly discouraged," *see* Order dated September 8, 2011, and because Petitioners'/Appellants' Supplemental Brief ("Supplemental Brief") offered few new legal arguments, Standard Laboratories, Inc. ("Standard Laboratories") incorporates by reference the previously filed Response of Standard Laboratories, Inc. to Petition for Appeal ("Response"), as if fully set forth herein.

This appeal concerns whether the doctrine of collateral estoppel prohibits Petitioners Larry Hatfield, Kenneth King and Mitchell McDerment (hereinafter sometimes "Petitioners") from re-litigating the compensability of their alleged workplace injuries. The few new legal arguments raised by Petitioners in their Supplemental Brief are addressed herein.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has notified the parties that oral argument will be heard pursuant to Rule 20 of the Rules of Appellate Procedure. Given the multiple respondents in this case, Standard Laboratories moves pursuant to Rule 20(e) that counsel for Virginia Crews Coal Company, Westmoreland Coal Company, Buffalo Mining Company, Independence Coal Company, Inc., and Rawl Sales & Processing Co., be permitted a total of twenty (20) minutes for oral argument; that counsel for Noone Associates, Inc. be permitted an additional ten (10) minutes for oral argument; and that counsel for Standard Laboratories also be permitted an additional ten (10) minutes for oral argument.

III. SUPPLEMENTAL ARGUMENT

A. THERE IS NO REQUIREMENT THAT EVERY ASPECT OF THE PRIOR PROCEEDING BE IDENTICAL TO THE CASE AT BAR FOR COLLATERAL ESTOPPEL TO APPLY.

Petitioners' Supplemental Brief erroneously states that courts have "consistently reiterated the need for all aspects of the proceeding to be identical" in order for collateral estoppel to apply. Pet. Supp. Br. at 13. This misstatement of law ignores the holding by this Court in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), that "not only the facts, but also the legal standards and procedures used, must be *similar*" to the administrative proceeding at issue, in order for collateral estoppel to apply. Only the legal issue addressed must be identical, not "all aspects of the proceeding" as Petitioners claim.

1. This Court's Ruling in *Abadir v. Dellinger* is Inapplicable to the Case at Bar.

Petitioners' reliance on *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743 (2011), a case not previously cited in the Petition for Appeal, in support of their contention that the issues in the instant case are not identical to those in the prior workers' compensation action is misplaced. Pet. Supp. Br. at 21. In *Abadir*, a group of medical professionals were sued to enforce the terms of a settlement agreement entered into by their attorney. The medical professionals argued the attorney had no authority to settle. The Circuit Court held the medical professionals failed to prove that the attorney had no *apparent* authority to settle. The medical professionals subsequently sued the attorney, arguing he had no *actual* authority to settle the case. The lower court applied collateral estoppel and dismissed that claim, holding that the West Virginia Supreme Court determined in a prior appeal that the attorney had authority to settle the claim. This Court reversed, holding that in the previous action the lower court did not expressly determine that the attorney had the *actual* authority to settle the case on behalf of his clients, only that he had *apparent* authority.

The instant case is clearly distinguishable from *Abadir* because the precise issue, whether a compensable injury exists, was previously determined by the Workers' Compensation Office of Judges ("Office of Judges"). It is undisputed that the Office of Judges determined the Petitioners Larry Hatfield, Kenneth King and Mitchell McDerment did not suffer a compensable injury in the course of and resulting from their employment with Standard Laboratories. Unlike *Abadir*, which dealt with actual authority versus apparent authority as two distinct legal issues and definitions, the statute defining the deliberate intention of an employer to produce an injury (hereinafter "deliberate intent") defines compensability by specifically referencing the workers' compensation statutory definition of a compensable injury. W. Va. Code § 23-4-2(d)(2)(ii)(E). Therefore, the definition of compensability in a deliberate intent claim is identical to compensability in the workers' compensation system.

2. The Potential for Petitioners to Recover Increased Damages in State Court Does Not Bar the Application of Collateral Estoppel Based Upon the Prior Workers' Compensation Decisions.

Petitioners further assert that their claims are not collaterally estopped because the workers' compensation system bars claimants from obtaining certain damages, such as loss of consortium. Pet. Supp. Br. at 15. This argument has no basis in West Virginia law. The tests for the application of collateral estoppel are addressed in detail in *State v. Miller* and in *Vest v. Board of Education*, both cited in Standard Laboratories' Response previously filed. *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). None of the elements of either of the *Miller* or *Vest* tests reference the damages available under a legal theory, because damages available are not relevant to whether collateral estoppel applies to a liability issue.

Similarly, the fact that Petitioners would not be subject to a "rigid set of disability guidelines" in civil litigation is not persuasive, since it was the Legislature's intention that the

employee and the employer equally compromise certain rights in exchange for a workers' compensation system which is fairer and less litigious to both parties. Pet. Supp. Br. at 16. This Court has consistently held that a claimant is not prejudiced by the loss of these rights. *Marcus v. Holley*, 217 W. Va. 508, 618 S.E.2d 517 (2005) (dismissing a challenge by a claimant to the right of the Legislature to determine a benefits schedule and a rate of recovery as unconstitutional, *inter alia*). Therefore, there is no merit to Petitioners' argument that the absence of certain remedies in workers' compensation claims means that the issue of compensability is not sufficiently similar in both the administrative and civil proceedings to meet the *Miller* identity prong.

B. THE FULL AND FAIR HEARINGS THAT PETITIONERS RECEIVED BEFORE THE WORKERS' COMPENSATION OFFICE OF JUDGES HAVE PRECLUSIVE EFFECT IN THE CASE AT BAR.

1. The Petitioners' Assertion that West Virginia has Never Given Workers' Compensation Proceedings Preclusive Effect is Incomplete.

As to the critical question of whether this Court should give workers' compensation decisions preclusive effect, the Petitioners state that "this Court has not applied collateral estoppel to Worker's Compensation proceedings." Pet. Supp. Br. at 17. This assertion fails to state that the West Virginia Supreme Court has not directly addressed this specific issue. Despite this being an issue of first impression, the elements of collateral estoppel clearly apply and decisions in other West Virginia courts indicate a willingness to apply collateral estoppel to administrative proceedings. *See, e.g., Vest, supra*, and *Corley v. Eastern Associated Coal Corp.*, 2009 WL 723120 (N.D.W.Va. 2009), discussed in detail in Standard Laboratories' Response.

Moreover, despite Petitioners' contention that the application of collateral estoppel has not been directly applied in a similar deliberate intent case related to workers' compensation proceedings, other administrative proceedings historically are given preclusive effect by West Virginia courts. Pet. Supp. Br. at 17-18. For example, in *Thomas v.*

Consolidation Coal Co. (Pocahontas Fuel Co. Division), 380 F.2d 69 (4th Cir. 1967), the Court held that the plaintiff could not sue in circuit court following a binding decision rendered in a labor arbitration. Citing *res judicata* based upon the prior administrative board decision, the *Thomas* Court held that where a litigant has exhausted his rights in a former action or who, having exhausted them, then seeks to bring that action anew in circuit court, he “had his day in court ...[and] is not entitled to another opportunity to present his claim or defense.” 380 F.2d at 77.

Thus, although the specific facts of this appeal are essentially an issue of first impression before this Court, West Virginia law in *Vest*, *Corley*, *Thomas* and numerous other decisions cited in the briefs of the respondents clearly illustrate relevant precedent to apply *res judicata* and collateral estoppel to administrative proceedings.

2. The *Vest* and *Page* Decisions Cited by Petitioners’ Supplemental Brief Apply the Correct Test, But Their Holdings are Not Dispositive in this Case.

In support of their supplemental argument that litigation before the Office of Judges should not be given preclusive effect, the Petitioners ask this Court to disregard the common law test for collateral estoppel clearly established in *Vest* and instead to rely solely upon *Vest’s* holding, despite the factual differences in the case at bar. *Vest v. Board of Education*, 193 W. Va. 222, 485 S.E.2d 781 (1995); Pet. Supp. Br. at 17. As articulated previously in Standard Laboratories’ Response, however, the holding of *Vest* is inapplicable here based upon the failure of the facts in *Vest* to meet the collateral estoppel criteria articulated by the *Vest* Court, whereas that criteria is clearly met by the facts relevant to Petitioners Larry Hatfield, Kenneth King and Mitchell McDerment.

Likewise, in *Page v. Columbia*, 198 W. Va. 378, 480 S.E.2d 817 (1996), the Plaintiff was permitted to bring an action for retaliatory discharge against her employer in circuit court, despite having raised the issue of employer misconduct in her termination during her

unemployment compensation hearing, because the administrative proceeding did not meet the elements of collateral estoppel. The Court held that the administrative process related to unemployment compensation eligibility was designed to be a relatively speedy and informal process, and the issue of whether the employee was terminated for misconduct was simply a peripheral issue.

It is clear, therefore, that in both *Vest* and *Page*, the administrative proceedings addressed by those courts bear marked differences to the workers' compensation system. Moreover, neither of those administrative procedures offer litigants the tools of civil litigation in addition to the benefit of less stringent evidentiary rules. As previously detailed in Standard Laboratories' Response, workers' compensation claim procedures are substantially similar to civil litigation and, in fact, where the procedures differ, the workers' compensation procedures generally differ in favor of the claimant, providing greater opportunities than those available in civil litigation. Therefore, the legal tests set forth and the analyses by the *Vest* and *Page* Courts have precedential value in this case, but the ultimate decisions in those cases are not dispositive of the issue here.

3. No Exceptions to the Doctrine of Collateral Estoppel Exist in the Instant Case.

Petitioners argue the lower court erred in applying the doctrine of collateral estoppel in the instant case because the availability of fact evidence characterized by Petitioners as "additional" prevents the application of collateral estoppel. Petitioners further argue that they did not introduce all of their relevant evidence at Petitioners' workers' compensation proceedings. Pet. Supp. Br. at 23-24. The assertion that an exception to collateral estoppel applies because Petitioners made a strategic decision not to introduce evidence which may now be considered relevant to the question at issue before the Office of Judges is unsupported by West Virginia law. In addition, the records in the underlying workers' compensation claims filed

and litigated by Larry Hatfield, Kenneth King and Mitchell McDerment clearly illustrate the considerable evidence that was submitted before the Office of Judges, confirming they previously had a full and fair opportunity to prove their claims.

While Petitioners' Supplemental Brief argues that they submitted to Judge Alsop after-acquired evidence and belated affidavits in an attempt to essentially re-try their workers' compensation claims in circuit court, the seminal issue in the instant case is whether Petitioners had the *opportunity* to litigate claims which alleged work-related injuries related to chemical exposure in a forum with similar judicial procedures. That issue is clearly answered in the affirmative, and as such, the prior determination of no compensable injury by the Office of Judges precludes the Petitioners' Larry Hatfield, Kenneth King and Mitchell McDerment from establishing the statutory element of a "serious compensable injury" required to prove a deliberate intent claim against Standard Laboratories. W. Va. Code § 23-4-2(d)(2)(ii). Thus, no exception to the doctrine of collateral estoppel exists, and the lower court did not err in granting summary judgment on those grounds.

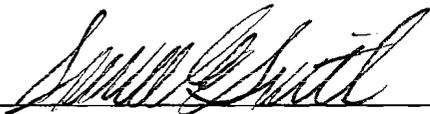
IV. CONCLUSION

The Circuit Court of Wyoming County correctly applied the elements of collateral estoppel to prohibit Larry Hatfield, Kenneth King and Mitchell McDerment from re-litigating the issues previously decided in their underlying workers' compensation proceedings. For the reasons set forth herein and also in the initial Response of Standard Laboratories, Inc. to Petition for Appeal, the Supreme Court of Appeals should affirm the decision of the Circuit Court and uphold the dismissal of Petitioners' claims on the grounds of collateral estoppel.

Respectfully submitted,

Standard Laboratories, Inc.

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Docket Number: 11-0397
Wyoming County Civil Action No. 04-C-252

LITWAR PROCESSING COMPANY, LLC;
VIRGINIA CREWS COAL COMPANY; et al.,

Defendants.

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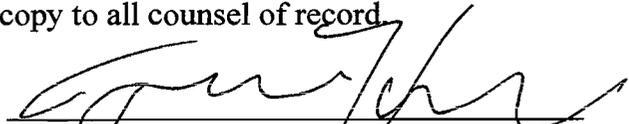
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