STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Steel of West Virginia, Inc.,
Plaintiff Below, Petitioner

vs) No. 11-1607 (Kanawha County 11-C-122)

West Virginia Office of the Insurance Commissioner,
Defendant Below, Respondent

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Steel of West Virginia, Inc. appeals the Circuit Court of Kanawha County's October 19, 2011, order dismissing with prejudice its complaint for declaratory judgment. Petitioner is represented by H. Toney Stroud. Respondent West Virginia Office of the Insurance Commissioner, in its capacity as administrator of workers' compensation "Old Fund" claims, is represented by Richard M. Crynock and David L. Stuart.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In July of 2001, petitioner's employee Robin Love filed an application for permanent total disability ("PTD") workers' compensation benefits. The then-existing Workers' Compensation Commission ("Commission") granted the PTD award on April 28, 2004. Petitioner filed a protest with the Office of Judges arguing, inter alia, that the award should be paid by the Second Injury Reserve Fund. The Commission responded that no relief was available from the Second Injury Reserve Fund because the PTD award was made in 2004, and the Legislature had abolished the Second Injury Reserve Fund effective July 1, 2003. *See* W.Va. Code § 23-3-1(d) [Repl. Vol. 2010] (stating in pertinent part that "[f]or all awards made on or after the effective date of the amendments to this section . . . the following provisions relating to second injury are not applicable.") The Office of Judges issued its decision on March 26, 2008, holding as follows:

> It is hereby ORDERED that the Claims Administrator's Order of April 28, 2004, granting a permanent total disability with an onset date of October 27, 1995, be MODIFIED to reflect the claimant's permanent total disability resulted from a combination of her work related injuries. However, second injury relief is not available in this claim and the employer is charged for the entire PTD award amount.

Petitioner appealed to the Workers' Compensation Board of Review, which affirmed. Petitioner then filed a petition for appeal with this Court, which was refused on January 19, 2010.

On January 25, 2011, petitioner filed the instant declaratory judgment action in circuit court seeking a ruling that Claimant Love's PTD claim should be indemnified by the Second Injury Reserve Fund. By final order entered October 19, 2011, the circuit court concluded that the doctrine of res judicata bars consideration of petitioner's claim, thus the court dismissed the case with prejudice.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Upon a review of the parties' arguments and the record on appeal, we conclude that petitioner's declaratory judgment action is barred by the doctrine of res judicata and thus dismissal with prejudice was proper.

The test for res judicata is well-settled:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr.*, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997). In addition, when the prior action was before an administrative tribunal, we also consider the following:

> For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

Syl. Pt. 2, *Vest v. Board of Educ. of County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781 (1995). All of the res judicata factors are present in this case.

Petitioner denies that it is seeking a "second bite at the apple" and argues that res judicata is not a bar to the instant case. Petitioner argues that pursuant to this Court's discussion in *White v. SWCC*, 164 W.Va. 284, 289, 262 S.E.2d 752, 756 (1980), for res judicata to apply the identical claim must have been both raised and determined in the prior action. Petitioner argues that

although it raised this same indemnity claim in the workers' compensation administrative proceedings, the claim was never "determined" in that action. We disagree. Although the Office of Judge's decision did not include an analysis of petitioner's arguments, it clearly "determined" this claim in a manner that was adverse to petitioner. That decision was thereafter upheld on appeal.

For the foregoing reasons, we affirm.[1]

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

Dissenting

Chief Justice Menis E. Ketchum

[1] The underlying legal issue presented in petitioner's declaratory judgment action is not before us in this appeal. However, we note that the issue of the application of the extensive 2003 amendments to the Workers' Compensation statutes was addressed in *Wampler Foods, Inc. v. Workers' Compensation Div.*, 216 W.Va. 129, 602 S.E.2d 805 (2004).