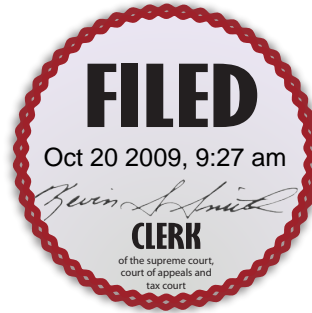


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEVOY & HICKS BODY SHOP and)
DAVID DEVOY,)
)
Appellants,)
)
vs.) No. 82A01-0906-CV-265
)
MIKE R. WALLACE,)
)
Appellee.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Tornatta, Judge
Cause No. 82D03-0604-PL-1655; Cause No. 82D03-0403-PL-3008

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

This single dispute comes to us within the context of three causes: (1) an award of worker's compensation benefits; (2) the employee's claim for the trial court to render judgment on that award; and (3) the employer's claim for fraud and breach of contract arising from the worker's compensation litigation. Specifically, DeVoy & Hicks Body Shop, Inc. and David DeVoy ("Employer") appeal the trial court's dismissal of their complaint for fraud and breach of contract and the trial court's subsequent denial of their motion to correct error. We affirm, concluding that the Employer is barred by claim preclusion from bringing its claims.

Facts and Procedural History

Mike R. Wallace ("Wallace") was injured while working for the Employer on August 16, 2001. The Employer lacked worker's compensation insurance at the time of the accident. Wallace filed a claim ("Cause #1") with the Worker's Compensation Board ("Board").

A hearing officer conducted an evidentiary hearing on March 3, 2003, but the Employer was neither present nor represented. That evening, the court reporter received a fax from David DeVoy ("DeVoy"), in which DeVoy stated that "I agreed to pay [Wallace] until the end of the year. I followed up on my end of the deal and he signed my release." Appellee Appendix at 4. DeVoy attached what purported to be a settlement agreement signed by Wallace. In response, the hearing officer allowed the Employer fifteen days to file "any additional post-hearing submissions." *Id.* at 1. Meanwhile, Wallace submitted an affidavit in which he denied having signed the purported settlement agreement. The hearing

officer found that the Employer “has failed to file any ‘Agreement to Compensation Between Employee and Employer’” Appellant Appendix at 37(2). Among other things, the hearing officer awarded Wallace more than \$44,000.

The Employer petitioned for review and to submit additional evidence. It attached an affidavit of DeVoy, in which he suggested that he had not received adequate notice of the March 3, 2003 hearing and that if he “had known the significance of the hearing, [he] would have been present and with counsel” and would have presented evidence that the Employer paid Wallace \$15,800, as well as the bills of Wallace’s physician.¹ Appellee App. at 11. The Board denied the Employer’s petition to submit additional evidence, noting that its “contended defenses” were “considered by the Single Hearing Member” Appellant App. at 37(7). It also affirmed the hearing officer’s decision.

The Employer filed a notice of appeal from the Board’s order. However, this Court dismissed the appeal, in January 2004, when the Employer failed to file a brief.

In June 2004, Wallace filed in the Vanderburgh Superior Court his “Complaint to Render Judgment on a Worker’s Compensation Board Award” (“Cause #2”). *Id.* at 35. Responding to Wallace’s complaint in November 2004, the Employer filed a motion for relief from the worker’s compensation award, in which it again argued that it did not receive adequate notice of the March 3, 2003 hearing, again asserted that it paid Wallace pursuant to a settlement agreement, and added that it had evidence that Wallace worked after the accident at three body shops in Illinois “during the time he claimed to be unable to work.” *Id.* at 45.

¹ DeVoy stated that the Employer paid Wallace \$5000 for vocational training and \$600 per week for eighteen weeks (\$10,800) in exchange for Wallace’s release of his claims. $\$5000 + \$10,800 = \$15,800$.

On October 10, 2005, the trial court denied the Employer's motion for relief from judgment and rendered judgment in favor of Wallace on his worker's compensation award. A week later, the Employer moved for leave to file a counterclaim, which was denied on December 5, 2005. More than three months later, Wallace filed for proceedings supplemental. Per agreement of the parties, a hearing was scheduled to occur on April 25, 2006.

The day before the hearing, the Employer filed a complaint against Wallace ("Cause #3"), making the same assertions as before and alleging that: (1) Wallace lied to the Employer when they entered the purported settlement agreement, and that such constituted fraud; (2) Wallace breached the purported settlement agreement; and (3) Wallace committed fraud upon the Board and the Vanderburgh Superior Court. On the Employer's motion, the trial court consolidated Causes #2 and #3.

Wallace moved to dismiss the consolidated cause for failure to state a claim upon which relief could be granted and argued that the Employer's complaint was a collateral attack on the final unappealed judgments in Causes #1 and #2. The trial court granted Wallace's motion to dismiss. In doing so, it suggested that "any fraud perpetrated would be within the purview of the Board" and that the Board had "the power in the case of fraud to vacate its approval of a compensation agreement and to entertain an application for that purpose." Appellant App. at 120. The trial court then stated that the Employer could either seek relief from the Board or appeal the trial court's grant of Wallace's motion to dismiss; the Employer pursued both avenues.

The Employer filed with the trial court a motion to correct error in December 2006.

The next month, it filed with the Board a “Motion to Set Aside Award, Motion for Stay of Execution of Award, Motion for Declaratory Judgment, and Motion for Emergency Hearing.” Id. at 32. On February 2, 2007, the hearing officer concluded that it lacked jurisdiction to consider the Employer’s submission. Curiously, the hearing officer ended its order by stating that the “matter is scheduled for further pre-trial conference on June 12, 2007 at 1:30 p.m.” Id. at 127.

The trial court’s Chronological Case Summary (“CCS”) contained the following entry regarding a March 9, 2007 hearing on the Employer’s motion to correct error:

Parties and court agree that because the 2/2/07 decision of the Worker’s Compensation Board is on appeal to the full industrial board that pursuant to T.R. 53.3(B)(2)² that the court should not render its decision on the motion to correct error until the full industrial board has rendered its decision.

Id. at 2. The CCS reflected no activity for the next nineteen months. Meanwhile, the appellate record does not reveal what the Board did, if anything, after the February 2, 2007 order of the hearing officer.

A new attorney appeared for Wallace in January 2009. In April 2009, the trial court denied the Employer’s motion to correct error.

The Employer now appeals.

Discussion and Decision

The Employer argues that the trial court erred in dismissing its complaint (Cause #3) for failure to state a claim upon which relief could be granted and in denying its subsequent

² The time limitation for ruling on a motion to correct error does not apply where the parties so stipulate. Ind. Trial Rule 53.3(B)(2).

motion to correct error. In response, Wallace argues that the Employer is barred from bringing its claims. We review de novo a trial court's dismissal of a complaint pursuant to Indiana Trial Rule 12(B)(6). McPeek v. McCardle, 888 N.E.2d 171, 173 (Ind. 2008).

Claim preclusion prevents the relitigation of matters where four factors are present:

(1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.

Finke v. N. Ind. Pub. Serv. Co., 899 N.E.2d 5, 9 (Ind. Ct. App. 2008) (quoting (Ind. Ct. App. 2003)). As the Employer's complaint constitutes the third cause relating to this dispute, we apply the claim-preclusion analysis to both Causes #1 and #2.

There appears to be no dispute regarding three of the four factors. First, there is no dispute that the Board and the trial court had jurisdiction over the respective parties and subject matter in Causes #1 and #2. Nor is there any dispute that the former judgments were rendered on the merits. As to the fourth claim-preclusion factor, the parties in the present litigation, the Employer and Wallace, were parties in Causes #1 and #2.

Thus, the applicability of claim preclusion rests on whether the instant matter was, or could have been, determined in the prior action. Cause #1 was Wallace's worker's compensation claim for which he ultimately received an award. As in Cause #1, the Employer continues to assert that Wallace agreed to a settlement. The Board clearly rejected this assertion in an order from which the Employer initiated an appeal, but failed to file an appellate brief. It was therefore conclusively determined in Cause #1 that Wallace did not

enter a settlement agreement.

The Employer's only unique assertion in Cause #2 was that it had evidence that Wallace worked for three body shops in Illinois after his accident, contrary to Wallace's testimony in Cause #1. In Cause #2, the trial court rendered judgment in favor of Wallace. Within thirty days of that order, the Employer did nothing other than to move for leave to file a counterclaim. After the trial court denied the Employer's motion, nothing occurred for more than three months. Accordingly, even the Employer's assertion that it held newly-discovered evidence was addressed dispositively and not challenged on appeal.

Claim preclusion therefore barred the Employer from bringing Cause #3. The trial court did not err in dismissing the Employer's complaint.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.