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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

DELBERT WILLIAMS, APPELLANT

v.

LEONE & KEEBLE, INC., RESPONDENT

Appeal from the Court of Appeals, Division III
No. 27701-1-III
September 8, 2009

PETITION FOR DISCRETIONARY REVIEW

LAW OFFICES OF RICHARD MCKINNEY

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IDENTITY OF PETITIONER

Petitioner, Delbert Williams, seeks review of a decision of the Court of Appeals, Division III, in the case of *Williams v. Leone & Keeble, Inc.*, No. 27701-1-III decided on September 8, 2009.

ISSUES PRESENTED FOR REVIEW

1. Can there be collateral estoppel or res judicata if the previous tribunal entered no judgment?
2. Can there be a collateral estoppel or res judicata if the issues before the previous tribunal are not the same as the issues in the present case?
3. Does the case of *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976) relied upon by the Court of Appeals, stand for nothing more than the “first to file” rule, a doctrine which is wholly unrelated to collateral estoppel and res judicata?

STATEMENT OF THE CASE

Petitioner, Delbert Williams, was at all material times, a Washington resident injured on a construction project where Leone & Keeble (L&K) was the general contractor. L&K has always been a Washington corporation with its only office in Washington. The place of the construction project was in Idaho.

Williams fell from a roof on the jobsite and suffered severe injuries. He applied for worker's compensation benefits through the Idaho Insurance Commission (IIC) which paid benefits without any formal litigation with Williams.

Subsequent to his initial filing for Idaho worker's compensation benefits, Williams sued L&K in Washington for failure to oversee the jobsite with reasonable care. L&K did not hire or pay Williams, who was an employee of both a subcontractor (Pro-Set Erectors) and a company who was providing laborers (Paycheck Connection). Both Pro-Set and Paycheck are Idaho corporations.

The Idaho Industrial Commission never considered any issues of fault, particularly any fault of L&K.

L&K moved for a dismissal of Plaintiff's claim based upon res judicata. That Motion was granted by the trial judge. The res judicata was purported to be the assumption of jurisdiction by the IIC over the worker's compensation claim. Williams appealed the trial court decision to Division III of the Court of Appeals which affirmed the trial court based upon the alternative doctrines of collateral estoppel or res judicata.

ARGUMENT

1. No collateral estoppel or res judicata unless the first tribunal entered a final judgment. The Court of Appeals decision defies all precedent in Washington and Idaho, which only invoke collateral estoppel and/or res judicata if there has been a final judgment in the first tribunal. The decision of the Court of Appeals conflicts with prior authority of the Washington Supreme Court and the Idaho Supreme Court. Contrary to clear precedent, the Court of Appeals in the present case specifically said that, "We do not need to address whether the elements of res judicata or collateral estoppel are met here."

Many Washington Supreme Court decisions have set forth the test for collateral estoppel which requires:

- 1) The issue in the prior adjudication is identical with the one presented in the second action.
- 2) The prior adjudication must have ended in a final judgment on the merits.
- 3) The party against whom [collateral estoppel] is asserted was a party or in privity with a party to the previous adjudication.
- 4) Application of the doctrine does not work an injustice.

State v. Vasquez, 148 Wn.2d 303, 308, 59 P.3d 648 (2002); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 950 P.2d 312 (1998).

Idaho also requires that the first tribunal enter a final judgment before there can be collateral estoppel. *Warnecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008, 1020 (2009); *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613 (2007).

These Idaho cases have a five part test for collateral estoppel:

- 1) The party against whom the earlier decision was decided had a full and fair opportunity to litigate the issue decided in the earlier case.
- 2) The issue decided in the prior litigation was identical to the issue presented in the present action.
- 3) The issue sought to be precluded was actually decided in the prior litigation.
- 4) There was a final judgment on the merits in the prior litigation.
- 5) The party against whom the issue was asserted was a party or in privity to a party in the litigation.

There are similar restrictive tests in both Washington and Idaho for res judicata, an alternative basis of the decision by the Court of Appeals in the present case. It is clear that L&K was not urging res judicata before the Court of Appeals, but was urging collateral estoppel. However, the Court of Appeals decision seems to rely alternatively on collateral estoppel or res judicata.¹

The Washington Supreme Court also requires a prior judgment before res judicata may be invoked. The test in Washington for res judicata is: A

¹ The Court of Appeals relied alternatively on res judicata or collateral estoppel, but explicitly refused to examine the legal elements of those defenses.

prior judgment will bar litigation of a subsequent claim if the prior judgment has a “concurrence of identity with [the] subsequent action in:

1. Subject matter.
2. Cause of Action.
3. Persons and parties.
4. Quality of the persons for or against whom the decision is made.

City of Arlington v. Central Puget Sound Growth Management Hearings Bd., 164 Wn.2d 768, 193 P.3d 1077, 1089 (2008); *Hilltop Terrace Home Owners Association v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995).

Similarly, in Idaho there must be a prior judgment before invoking res judicata. *Andrus v. Nicholson*, 145 Idaho 774, 777, 186 P.3d 630, 633 (2008).

Diamond v. Farmers Group, Inc., 119 Idaho 146, 148, 864 P.2d 319 (1990) provides guidance on the necessary elements for a prior judgment, “the former adjudication includes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.”

An adjudication which was not completed may not be used for purposes of invoking a prior judgment. *Rufener v. Scott*, 46 Wn.2d 240, 280

P.2d 253 (1955) (Res judicata is inapplicable if the first case was merely submitted to the tribunal without a final decision); *Green v. City of Wenatchee*, 148 Wn. App. 351, 362, 199 P.3d 1029 (2009) (There is no final judgment if the case settles.); *City of Des Moines v. Personal Property of \$81,200*, 87 Wn.App. 689, 702, 943 P.2d 669 (1997) (A judgment is final at the beginning of the appellate process.)

It is extremely significant that the Idaho Supreme Court has held that an administrative determination of worker's compensation benefits does not constitute a prior judgment for collateral estoppel purposes. *Warnecke, supra*, at 1020. Not only is this ruling in *Warnecke* logical, but it undermines the holding of the Court of Appeals in the present case that an administrative decision of the IIC, not resulting in a final judgment, can provide the basis for collateral estoppel.

2. Can there be a collateral estoppel or res judicata if the issues before the previous tribunal are not the same as the issues in the present case? The filing for worker's compensation benefits with the IIC was factually unrelated in most ways to the tort claim filed in the present case. As stated above, collateral estoppel requires a prior factual adjudication that is identical with the one presented in the present case. Res

judicata requires that the issues in the first case were or should have been included in the first adjudication. See authorities referenced above.

It is obvious that a tort claim which inquires into the negligence of a general contractor is separate from the issues in a worker's compensation case as to whether the employee was injured on the job. It is also obvious that tort claims involve issues of general damages which are beyond the purview of a worker's compensation claim.

Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 175 (1983) sets forth a four part test as to whether the first and second cases involve the "same claim" for res judicata purposes:

- 1) Whether rights established in the prior action [Idaho WC claim] would be destroyed by prosecuting the second action.
- 2) Whether substantially the same evidence is presented in the two actions.
- 3) Whether the two suits involve infringement of the same right.
- 4) Whether the two suits arise out of the same transactional nucleus of fact.

It is clear that only part four of this test applies, and that part does not apply entirely. In the present case, there are issues of negligence of L&K which are not part of the "transactional nucleus of facts" of the worker's

compensation claim. Admittedly, both the WC claim and the tort claim are out of the same accident. Yet, even conceding that prong number four of the *Rains* test is met, it is apparent that none of the other portions of the *Rains* test are met. Therefore, the WC claim and the tort claim are not the “same claim” for res judicata purposes.

Similarly, the test for collateral estoppel is that the factual issues in both cases are identical. There was no disputed fact adjudicated by the IIC which is identical to any fact that needs to be determined by the Washington court in the tort claim. Compare *Anderson v. Gailey*, discussed at length below, where both the IIC and the trial court needed a factual determination as to whether the employee was within or without the scope of his authority at the time of his accident.

3. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976) relied upon by the Court of Appeals, stand for nothing more than the “first to file” rule, a doctrine which is wholly unrelated to collateral estoppel and res judicata. The Court of Appeals and the trial court relied almost entirely on the *Anderson* case in rendering their decisions. There are unique facts in *Anderson* which distinguish it from the present case. Additionally, there is language in *Anderson* which is misleading to the point that the Court of

Appeals was willing to ignore the definitions of collateral estoppel and res judicata.

Anderson involved a claimant who simply wanted money from some source. First he filed with the IIC to get worker's compensation benefits on the theory that he was operating within the scope of his authority when injured. Next, he filed a tort claim in the Idaho District Court claiming that he should be able to sue his employer because he was operating outside the scope of this authority as an employee when injured.

There was a common fact that was essential to both the IIC claim and the tort claim, i.e. whether the claimant was within or without the scope of his authority. *Anderson* holds that either tribunal could determine the question of jurisdiction. Obviously, jurisdiction depended in both tribunals on the factual determination as to whether the claimant was within or without the scope of his authority when injured. If within the scope of his authority, then only the IIC had jurisdiction over the claimant of the case. Conversely, if the worker was without the scope of his authority, then only the District Court had jurisdiction over the case. *Anderson* specifically holds that there was concurrent jurisdiction to determine which of the two tribunals had jurisdiction over the claimant. Of course, they could not both have jurisdiction at the same time.

Quoting from *Scott v. Industrial Accident Commission*, 46 Cal.2d 76, 293 P.2d 18 (1956), *Anderson* approved the following language:

“The determinations of the commission like those of the superior court are res judicata in all subsequent proceedings, including court actions, between the same parties...Thus, if there is a final determination as to the issue of coverage (i.e., of jurisdiction) in either the commission or the superior court proceedings, such determination will be res judicata in subsequent proceedings before the other tribunal between the same parties...”

Anderson further states that “If the notice of injury was filed with the Industrial Commission before the plaintiffs filed their original complaint...then the Industrial Commission has the first right to determine the jurisdictional issue and its determination is res judicata upon the question of jurisdiction...”

The above language is creating the confusion in the present case. A determination of jurisdiction is not made simply by accepting a case. A determination of jurisdiction is made if there is a contest over the issue of jurisdiction and a final adjudication one way or the other.

Even more importantly, in *Anderson* there could not be jurisdiction with both the IIC and the District Court at the same time because a particular factual determination would necessarily include one tribunal and exclude the other tribunal. That is not true in the present case. There is no reason why

Williams cannot receive worker's compensation benefits while also proceeding against a totally different party for negligence. There is no inconsistency between the assumption of jurisdiction by the IIC and a tort claim against L&K. For that reason alone, *Anderson* is inapplicable.

At a more subtle level, *Anderson* simply states the "priority of filing rule." That rule is that the first tribunal to get authority over a factual issue has the right to make the final adjudication. Two California cases which interpreted *Scott* (quoted in *Anderson*) have held that *Scott* simply states the priority of filing rule. *Loftis v. Superior Court for San Diego County*, 205 Cal. App.2d 148, 23 Cal. Rptr. 125, 126 (1962); *Robinson v. Superior Court for Kings County*, 203 Cal. App. 2d 263, 21 Cal. Rptr. 475, 478 (1962).

Washington and virtually every other jurisdiction have adopted the same "priority of filing" rule. *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996); *American Mobile Homes of Washington, Inc. v. Seattle-First National Bank*, 115 Wn.2d 307, 316, 796 P.2d 1276 (1990).

The priority of filing rule is simply a rule of comity among courts of concurrent jurisdiction. It can become a rule of claim preclusion (res judicata) if the first tribunal to get jurisdiction actually makes a final

determination. Under no circumstances is there any authority for the priority of filing rule to block a tort claim when the first tribunal never makes any final decision at all, let alone a decision that relates to an issue that could preclude the availability of the tort claim.

While *Anderson* is the primary authority which has created so much confusion, the Court of Appeals also cited *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999). *Baker* was not even decided on collateral estoppel or res judicata grounds. *Baker* simply holds that if a worker is within the scope of his authority, he cannot bring a tort claim against his employer. *Baker* does refer to a decision of the IIC regarding scope of authority of the claimant while at work, but it does not rely on collateral estoppel or res judicata. *Baker* is distinguishable because there was at least an IIC finding after both sides contested the factual issue as to scope of authority. More importantly, *Baker* is distinguishable because scope of authority, a factual determination within the purview of the IIC, was an issue which would preclude the bringing of the tort claim. There is no similar determinative issue in the present case.

It is a tautology to say that the IIC “determined its exclusive jurisdiction” which excludes Williams’ tort claim in Superior Court unless there is: 1) a contested adjudication which affects the jurisdiction of both

tribunals, 2) an issue of fact which permits the IIC or the District Court [Superior Court in the present case] to be the sole adjudicator of two conflicting jurisdictional claims.

Unlike *Anderson* or *Baker* there is no conflict between the Superior Court jurisdiction and the IIC jurisdiction. Moreover, unlike *Baker* or *Anderson* there has been no contested litigation of a factual issue which could potentially exclude the jurisdiction of the District Court [Superior Court in Washington].

CONCLUSION

The Court of Appeals took the radical step of frankly announcing that it intended to disregard precedent because of the confusion over one old decision in a sister state. It is fair to Williams and conducive to a more lucid and consistent application of the law to correct or overlook the ambiguities of the *Anderson* decision and to apply the normal definitions of collateral estoppel and res judicata.

RESPECTFULLY SUBMITTED this 5th day of October, 2009.


RICHARD MCKINNEY, WSBA No. 4895

CERTIFICATE OF SERVICE

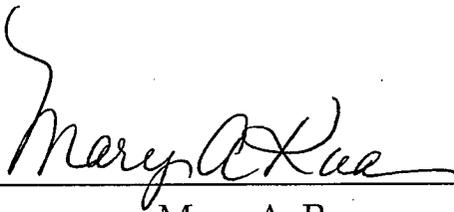
I hereby certify that on October 7th, 2009, the original and one (1) copy of the **Petition for Review** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

COURT OF APPEALS, DIVISION III
Office of the Clerk
500 N. Cedar Street
Spokane, Washington 99201-1905

In addition, I served one (1) copy of the **Petition for Review**, via hand delivery, to the following:

Andrew C. Bohrnsen
9 South Washington, Suite 300
Spokane, Washington 99201

I certify under penalty of perjury, according to the laws of the State of Washington, that the foregoing is true and correct.



Mary A. Rua

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general contractor on the project. Mr. Williams submitted his worker's compensation claim in Idaho and was paid worker compensation benefits by the Idaho State Insurance Fund. Later, Mr. Williams sued L&K for negligence in Washington. In its answer, L&K denied that Washington had jurisdiction of the matter.

Mr. Williams moved for summary judgment, arguing that Washington law should apply because L&K did considerable work in both Washington and Idaho, used the same safety standards in both states, and applied the Washington Administrative Code to many of its Idaho projects. L&K moved for dismissal based on lack of Washington jurisdiction. In the alternative, it moved for application of Idaho law if the Washington court determined it had jurisdiction.

L&K pointed out that once the Idaho Industrial Commission makes a final determination as to coverage, this determination is res judicata as to jurisdiction in subsequent proceedings before other tribunals. L&K argued, "The plaintiff . . . is attempting to re-litigate the issue of jurisdiction supporting a different conclusion. Idaho's jurisdiction was previously decided in his favor and he has received the pecuniary benefits of that decision." Clerk's Papers (CP) at 256-57.

Mr. Williams responded that res judicata did not apply because there had never been a final adjudication and he was neither present nor represented when the Idaho Industrial Commission determined he was entitled to worker's compensation benefits.

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The trial court denied Mr. Williams' motion for summary judgment and granted L&K's motion to dismiss for lack of jurisdiction, finding that the Idaho Industrial Commission's decision to award Mr. Williams benefits was res judicata as to the issue of jurisdiction in this state. Mr. Williams appeals.

ANALYSIS

The dispositive issue is whether the trial court erred in concluding that res judicata bars relitigation of the issue of jurisdiction in Washington. The trial court's decision to decline jurisdiction is a matter of law that is reviewed de novo. *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006); *Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996). Whether res judicata bars relitigation of an issue or claim is also an issue of law we review de novo. *Kuhlman v. Thomas*, 78 Wn. App. 115, 119-20, 897 P.2d 365 (1995).

In its letter opinion, the trial court wrote:

The court finds that by submitting and receiving benefits on a claim to the Idaho Industrial Commission on his work-related injury, plaintiff is precluded from asserting that the superior court of Spokane County, Washington . . . has jurisdiction over this same matter. Res judicata applies to bar relitigation of the issue of jurisdiction in this state.

CP at 263.

In reaching this conclusion, the court noted that it was persuaded by L&K's trial memorandum, which argued that "the jurisdictional issue has already been decided as a matter of law by the Idaho Industrial Commission. As a result, this Court and the parties

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are now precluded from re-litigating the jurisdictional issue by operation of the doctrine of *res judicata*.” CP at 107-08 (Def.’s Mem. of Authorities in Supp. of Mot. to Dismiss). L&K cited *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999) and *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976) to support its argument.

These cases control here. In *Baker*, a plaintiff filed a worker’s compensation claim after he was injured in a car accident driving from one job site to another. The Idaho Industrial Commission awarded him worker’s compensation benefits. *Baker*, 132 Idaho at 748. Later, the plaintiff filed suit against his employer for negligence. The trial court dismissed the case, concluding that the suit was barred by the exclusive remedy provisions of Idaho’s worker’s compensation laws.

The Idaho Supreme Court affirmed, noting that a person injured in the course of employment has only a worker’s compensation claim against the employer, not a tort action. *Baker*, 132 Idaho at 749. The court held that the operation of the exclusive remedy rule grants the Idaho Industrial Commission exclusive jurisdiction over claims arising in the course of employment. *Id.* at 750.

In *Anderson*, the plaintiffs brought a wrongful death action on behalf of their son who was killed in an accident at work. One of the issues was whether the trial court had jurisdiction to consider the tort action or whether the plaintiffs’ exclusive remedy was before the Idaho Industrial Commission under worker’s compensation law. The court stated, “Whenever an employee is injured or killed in the course of an employer-

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employee relationship within the coverage of the Workmen's Compensation Law, the injury or death ordinarily gives rise to no cause of action in tort regardless of the fault of the employer." *Anderson*, 97 Idaho at 819.

In *Anderson*, the court noted that it was not clear from the record whether the Idaho Industrial Commission had decided whether the injury gave rise to a worker's compensation claim. However, for remand purposes, the court held:

[I]f the notice of injury was filed with the Industrial Commission before the plaintiffs filed their original complaint with the district court, then the Industrial Commission has the first right to determine the jurisdictional issue, and its determination is res judicata upon the question of jurisdiction and the factual questions upon which the determination of jurisdiction must necessarily turn.

Id. at 825.

Mr. Williams argues that *Anderson* is "anomalous to the point of absurdity" and that the case merely holds that if two tribunals have concurrent jurisdiction to determine a legal issue, the first tribunal must make a final decision before res judicata applies. Appellant's Br. at 11. Mr. Williams also argues that res judicata does not apply because the Idaho Industrial Commission's award of benefits was an administrative decision, not a final adjudication. Finally, he argues that the elements of res judicata are not met.

Mr. Williams' arguments are meritless. It is undisputed that Mr. Williams filed his first report of injury in Idaho and the Idaho State Insurance Fund accepted his claim as compensable. Under *Anderson*, the filing of the claim and the Idaho Industrial

Commission's decision to pay benefits is determinative of the issue of jurisdiction.

Anderson, 97 Idaho at 824 (holding that if the Idaho Industrial Commission or superior court makes a final decision as to coverage, such determination is res judicata in subsequent proceedings).

Based on the principles adopted by the Idaho Supreme Court in *Anderson* and *Baker*, the Idaho Industrial Commission has the first right to determine the jurisdictional issue and its award of benefits to Mr. Williams is res judicata as to the jurisdictional issue in the proceeding before the Washington trial court. The trial court did not err by applying the clear language of the *Anderson* opinion to the undisputed facts of this case.

We do not need to address whether the elements of res judicata or collateral estoppel are met here.² The Idaho Supreme Court has held that res judicata bars relitigation of the issue of jurisdiction when the Idaho Industrial Commission awards worker's compensation benefits to a plaintiff. *Anderson* and *Baker* are sound precedent.

² L&K points out that the more precise term here is collateral estoppel, which precludes relitigation of the same issue in a subsequent suit. However, it was not error for the trial court to use the term res judicata. In Washington and Idaho, the term res judicata often encompasses both issue and claim preclusion. See *Navarro v. Yonkers*, 144 Idaho 882, 885, 173 P.3d 1141 (2007) (res judicata includes claim preclusion and issue preclusion); see also Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985) ("At times the term 'res judicata' is used in the cases and literature to refer to the entire subject of the preclusive effect of judgments, including the relitigation of claims and issues that were litigated . . . in a prior action.").

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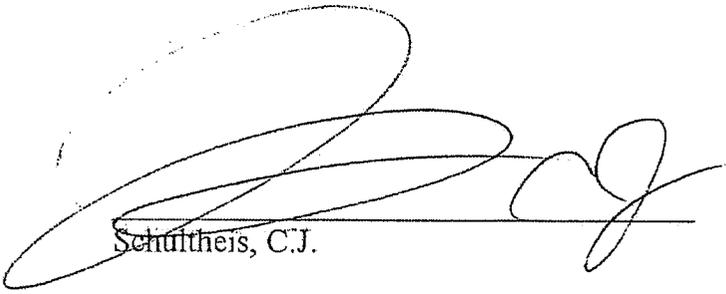
In view of these cases, the trial court did not find it necessary to address the elements of res judicata or collateral estoppel. It is not necessary for us to do so.

CONCLUSION

The issue of jurisdiction was determined by the Idaho Industrial Commission when it awarded worker's compensation benefits to Mr. Williams. Accordingly, the trial court did not err in concluding that res judicata barred relitigation of the issue of jurisdiction and dismissing the case. We therefore affirm.

Costs/Attorney Fees

L&K requests costs and statutory attorney fees pursuant to RAP 14.2. RAP 14.2 provides for an award of costs "to the party that substantially prevails on review." As the prevailing party in this appeal, L&K is entitled to its costs, including statutory attorney fees.

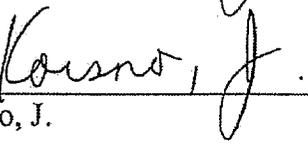


Schultheis, C.J.

WE CONCUR:



Kulik, J.



Korsmo, J.