Macwhinnie v Advanced Neuromodulation Sys., Inc.
2020 NY Slip Op 34027(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 155213/2019
Judge: David Benjamin Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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ROBERT MACWHINNIE,

Plaintiff,

- v -

ADVANCED NEUROMODULATION SYSTEMS, INC. D/B/A ADVANCED ST. JUDE MEDICAL NEUROMEODULATION DIVISION,

Defendant.

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INDEX NO. 155213/2019

MOTION DATE 09/22/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 48, 50, 52, 56 were read on this motion to/for ORDER/JUDGMENT NUNC PRO TUNC.

Upon the foregoing documents:

In this action, in which plaintiff alleges personal injury caused by a defective medical device, plaintiff moves: (1) for a determination that Workers Compensation Law (WCL) § 29 (5) does not apply to him in relation to this action; or (2) for a compromise order approving plaintiff's proposed settlement with defendant; or (3) for an order approving plaintiff's settlement with defendant nunc pro tunc.[1] The defendant, which has not answered the complaint, is the manufacturer/seller of the allegedly defective medical device (St. Jude).

Nonparty Utica Mutual Insurance Company (Utica or the Carrier) moves to dismiss the petition filed by plaintiff in this action, in which plaintiff seeks the relief described above (NYSCEF Doc. No. 5). Utica, the workers' compensation insurance carrier for plaintiff's former employer, paid plaintiff wage and medical benefits, due to a workplace injury which plaintiff

[1] Plaintiff moved for relief by way of a notice of petition filed in this action on September 26, 2019 as motion sequence No. 004.

sustained in May 2006. Utica stopped paying plaintiff benefits on May 24, 2018, based upon a determination of the Workers' Compensation Board (WCB or the WCB) that plaintiff had settled his medical device claim against St. Jude without the Carrier's consent.

Background

The complaint against St. Jude, filed on May 23, 2019, alleges that, on or about September 19, 2008, a medical device (the stimulator), implanted into plaintiff for relief of back and lower body pain, malfunctioned causing plaintiff to suffer back pain and necessitating a subsequent surgery to remove the device. Plaintiff alleges that he endured pain and suffering while the stimulator was not functioning and during the removal surgery.

In the petition, filed on May 30, 2019, plaintiff alleges that he, and others who were implanted with stimulators, reached a proposed settlement with St. Jude which could only be finalized with the approval of lienholders, such as Utica. Plaintiff contends that he notified his former employer and Utica that a proposed settlement had been reached, and alerted Utica that it might have a lien for medical expenses related to surgically removing the stimulator, for which, it is undisputed, Utica paid. Plaintiff claims that Utica did not negotiate the lien amount in good faith, as plaintiff believed was occurring, but sought to have his workers compensation benefits terminated. Plaintiff alleges that "the WCB terminated [plaintiff's workers' compensation] benefits, finding [that plaintiff] had entered into a *related* third-party settlement without the Carrier's consent as required by [WCL §] 29" (NYSCEF Doc. No. 5 at 2 [emphasis added]).

In the Proceedings at the WCB, by decision dated November 16, 2017, a WCB law judge (WCLJ) determined that Utica was to continue making payments to plaintiff at a "$375.86 tentative rate" (NYSCEF Doc. No. 18). The WCLJ noted that the Carrier maintained that plaintiff had settled a third-party action without its consent and sought suspension of benefits,

but continued the claim in order that the parties might produce all of the documentation concerning plaintiff's claim against St. Jude.

By application dated December 15, 2017, the Carrier sought review and rescission of the WCLJ's determination, arguing that plaintiff had settled a third-party action;[2] without Utica's consent as required pursuant to WCL § 29 (5), which barred further payments to plaintiff (NYSCEF Doc No. 19). Utica requested that the WCB issue an order directing that no further awards were payable until plaintiff produced evidence of the Carrier's consent to his settlement. Utica stated that it was submitting a settlement agreement and release of all claims related to the stimulator, arising out of plaintiff's worker's compensation claim. On May 24, 2018, a WCB panel (the panel) determined that plaintiff was not entitled to continuing awards and was barred from receiving further wage replacements, as he had failed to obtain consent from the Carrier prior to settling the third-party action (NYSCEF Doc. No. 20 at 5]).

Plaintiff sought review from the full WCB, requesting that the panel's decision be rescinded and the matter held in abeyance pending an agreement between plaintiff and the Carrier. Alternatively, plaintiff sought time to file a court action for a compromise or approval order (NYSCEF Doc. No. 21). The panel denied the request. On August 23, 2018, plaintiff again sought full WCB review or reconsideration of the panel's decision (reconsideration application) on the ground that the panel erroneously concluded that plaintiff finalized his settlement as a condition precedent to finalizing the settlement remained. Plaintiff further contended that the Carrier was not required to approve plaintiff's products liability claim because

[2] As used by the WCB, "third-party action" indicates plaintiff's claim against St. Jude relating the allegedly defective stimulator. However, there is no dispute that plaintiff did not file a lawsuit against St. Jude, other than this action.

that claim was not for the same injury that was a predicate for payment of worker' compensation benefits. Utica submitted a rebuttal. The panel denied plaintiff's reconsideration application.

Discussion

WCL§ 29 (5) provides that, for an injured employee's settlement of a related third-party claim for less than then the amount of compensation provided under the WCL, the injured employee must obtain either the consent of the carrier at the time of settlement or an order of the court approving the settlement within three months after settlement is entered (*Matter of Williams v Orange & Sullivan Excavating Corp.*, 114 AD3d 802, 803 [2d Dept 2014]). Failure to do so may result in the loss of future workers' compensation benefits (*Matter of Jackson v City of New York*, 70 AD3d 694, 695 [2d Dept 2010]). However, a judicial order may be obtained nunc pro tunc approving a previously agreed upon settlement, even in cases where the approval is sought more than three months after the date of the settlement (*Williams,* 114 AD3d at 803; *Jackson,* 70 AD3d at 695).

As a threshold issue, Utica seeks dismissal of the petition pursuant to CPLR 3211 (a) (4), arguing that plaintiff has filed a notice of appeal (NOA) from the WCB's determination that he entered into a third-party settlement without obtaining Utica's consent. Utica contends that, here, plaintiff argues that he was not required to obtain Utica's consent and seeks the same relief that he sought before the WCB. Utica's arguments are unpersuasive as it provides no authority to demonstrate that plaintiff's conduct in filing an NOA precludes adjudication here, or that a request for an order nunc pro tunc is for the same relief rendered by the WCB.

Plaintiff argues that, pursuant to WCL § 29 (5), he is entitled to a determination that he was not required to obtain Utica's consent for his proposed settlement because: (1) he has not yet entered into a settlement; (2) the amount of any proposed settlement is less than Utica's lien;

and (3) the proposed settlement for a products liability claim does not arise from the accident that caused the injury for which plaintiff was awarded workers' compensation benefits. Alternatively, plaintiff seeks a compromise order, approving his settlement. Plaintiff submits an executed copy of documents entitled "Master Compromise, Settlement, Release and Indemnity Agreement for the Settlement of the Claims of the Clients of Chaffin Luhana LLP Regarding St. Jude Medical Spinal Cord Stimulator Products" and "Confidential Settlement Agreement and Release of all Claims" (the Settlement Documents). Plaintiff contends that the Settlement Documents demonstrate that the settlement between plaintiff and St. Jude has not been finalized as there remain conditions to settlement. Plaintiff further contends that he has not received any settlement money, and will not receive any absent court approval of the settlement. Utica argues that res judicata and collateral estoppel bar plaintiff from obtaining the determination or a compromise order.

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party . . . . The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001][citations omitted]). Other considerations are "fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results" (*id*. at 304 [internal quotation marks and citation omitted]). For collateral estoppel to apply, "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*id*. at 303-304). The burden lies with "[t]he litigant seeking the benefit of collateral estoppel [to] demonstrate that the decisive issue was necessarily decided in the prior

action" and "[t]he party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*id.* at 304). As a general rule, "[t]he quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect" (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013] [discussing collateral estoppel elements concerning agencies]).

Utica argues that, in the WCB proceeding, it sought suspension of plaintiff's benefits based upon his failure to obtain Utica's consent to the settlement with St. Jude, and that the WCB determined that plaintiff entered into the settlement with St. Jude without obtaining that consent. Utica contends that plaintiff exhausted his remedies at the WCB, where he had an opportunity to oppose the determination. Utica notes that plaintiff previously attempted to obtain its consent, but here takes the contrary position that consent under WCL § 29 (5) is not required.

In the WCB proceeding, the panel defined the issue presented as whether plaintiff was barred from receiving further workers' compensation benefits based on his failure to obtain the Carrier's consent prior to settling his third-party action. The panel stated that plaintiff's attorney, in a letter dated November 2016, advised the WCB and the Carrier that, on March 10, 2016, plaintiff signed a general release "relating to a third-party action associated with his work-related injuries" (NYSCEF Doc. No. 20 at 2). The panel also discussed a letter dated February 22, 2017, in which plaintiff's products liability counsel indicated that that action was a medical products liability class action involving a defective stimulator, and "attached a copy of the settlement agreement and release of all claims signed March 10, 2016" (*id.* at 3).

In its legal analysis, the panel discussed Utica's argument that plaintiff was required to obtain its consent or a compromise order prior to the settlement in order to continue receiving

worker' compensation benefits.[3] Addressing WCL § 29 (5), the panel stated that "any third-party action settlement by an employee for less than the compensation provided for by the WCL requires written approval of the entity liable to pay the same" and that the failure to obtain consent was a bar to additional wage replacements and benefits (*id.* at 4). The panel found that the "third-party action in this case involved a class action relating to a malfunctioning . . . stimulator" and "was one for products liability and, for that reason, the claimant was required to obtain either consent from the carrier [to the settlement] or a compromise order from the court. . . to continue receiving workers' compensation benefits" (*id.*) The panel also found that plaintiff failed to seek the Carrier's consent until "after the third-party action was settled" (*id.*). The panel determined that plaintiff had not obtained carrier consent required under WCL § 29 (5) and, consequently, rescinded the WCLJ's determination to continue plaintiff's award.

Plaintiff's argument, that Utica's consent was not required under WCL § 29 (5) for various reasons, conflicts with the WCB panel determination, which necessarily determined that WCL § 25 applied and that Utica's required consent was not obtained. The panel also necessarily determined that plaintiff and St. Jude entered into a settlement and that plaintiff's products liability claim and settlement fell within the scope of WCL § 29 (5).[4] Plaintiff argues that he lacked a full and fair opportunity to litigate before the WCB, because he was not represented by counsel during the November 2017 hearing before the WCLJ,[5] but provides no evidence that he was not permitted to represent himself, or authority to demonstrate that lack of

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[3] The panel addressed the arguments of the Special Funds Group, the submissions of which were not provided here.

[4] As the court has determined that the issue was previously adjudicated before the WCB, no determination is made here as to whether or not plaintiff was required to obtain Utica's consent to the settlement pursuant to WCL § 29 (5).

5 In its decision, the WCB noted that plaintiff retained counsel approximately a month after the hearing, on December 14, 2017.

counsel sufficiently demonstrates the absence of a full and fair opportunity to litigate before an agency. Consequently, collateral estoppel precludes relitigation of plaintiff's claims that he did not enter into a settlement with St. Jude and that WCL § 29 (5) does not apply. To the extent that it appears that plaintiff disagrees with the WCB's determination, his remedy lies in appeal of the agency's decision.

However, WCL § 29 (5) permits a *court* to grant approval of the settlement. Therefore, the issue of court approval of the settlement nunc pro tunc could not have been litigated before the WCB. Res judicata also is not a bar to such a determination (*see Matter of Kusiak v Commercial Union Assur. Cos.*, 49 AD2d 122, 124-126 [4th Dept 1975] [court determination to issue compromise order was not precluded by earlier WCB referee determination that insurance carrier had not consented to settlement]). Pursuant to WCL § 29 (5):

> "[A] judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even where the application for approval is sought more than three months after the date of settlement, provided that the employee can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the employee's fault or neglect, and (3) the insurance carrier was not prejudiced by the delay"

(*Williams*, 114 AD3d at 803). The parties' arguments focus on the timeliness of plaintiff's application here, prejudice to Utica, and the extent of plaintiff's compliance with WCL § 29 (5)'s technical requirements for submissions.

Concerning reasonableness, in moving, plaintiff submits his counsel's affidavit setting forth the amount of money that plaintiff will receive after payment of what plaintiff's counsel avers is the lien amount due for the cost of the removal of the stimulator and attorneys' fees. Plaintiff also submits, under seal, the Settlement Documents, which include a settlement agreement and release, signed by plaintiff and dated March 10, 2016. Plaintiff contends that the settlement is reasonable because plaintiff's products liability claim faced both preemption under

federal law and statute of limitations issues. Utica does not dispute those contentions, or even suggest that plaintiff might have been able to obtain a better settlement amount.

Concerning timeliness of the application, "[t]he reason for petitioner's delay rather than its length determines the timeliness of a motion pursuant to [WCL] § 29 (5) for a nunc pro tunc compromise order" (*Amsili v Boozoglou*, 203 AD2d 137, 138 [1st Dept 1994] [In dispute between insurers "endeavoring to avoid coverage," the fact that petitioner had not been paid any compensation benefits for many years and other delays involved with adjudication at WCB constituted sufficient excuse for delay]). Plaintiff asserts that he has attempted to resolve the lien in good faith since August 2016, believed that the Carrier was doing the same, and anticipated a resolution that would finalize the settlement. Plaintiff's counsel submits a letter which he avers was from his firm to Utica, dated August 17, 2016, addressing Utica's claim for payment related to the stimulator's removal, and a February 8, 2017 letter which addresses settlement proposals, and which plaintiff's counsel avers was a letter from plaintiff's former workers' compensation attorney to Utica.[6] Plaintiff argues that he should not be penalized for the delay, as the settlement does not fall under WCL § 29 (5), so that he was not at fault for not seeking earlier approval, and also was involved in seeking WCB review. Utica argues that plaintiff has not offered a reasonable excuse for not seeking a compromise order until a year after his workers' compensation benefits were suspended, when, during that time, plaintiff submitted two requests for full WCB board review, raising the same issues that he raised here, and also filed an appeal.

In those cases where an injured employee offers an excuses for delay, courts appear to refrain from harsh judgment as to what constitutes fault or negligence, accepting as sufficient

[6] Plaintiff contends that Utica used the information he or his counsel provided to attempt to settle Utica's lien to seek suspension of plaintiff's benefits at the WCB.

reasons that include personal issues and mistakes and misunderstandings, including those of counsel (*see Matter of Wojciechowski v First Cardinal, LLC*, 79 AD3d 1487, 1488 [3d Dept 2010] [counsel's illness causing him to fall behind in work, misunderstanding as to workers' compensation attorney assertions about lien, and difficulties encountered in obtaining physician affidavit were sufficient reasons for delay]*; De Rosa v Petrylak*, 290 AD2d 596, 598 [3d Dept 2002] [sufficient excuse where delay based upon plaintiff's "well-justified belief, based on the express language of [WCL] § 29," and where "at the time of the third-party settlement, it did not appear that plaintiff would be entitled to receive workers' compensation death benefits"]; *Jackson v City of New York*, 22 Misc 3d 1113(A), 2009 NY Slip Op 50108(U) [Sup Ct, Kings County 2009], *affd* 70 AD3d 694 [2d Dept 2010] [petitioner's personal loss and illness, adjudication at WCB, and legal advice of workers' compensation attorney concerning need for consent sufficiently demonstrated lack of fault]; *compare Matter of Williams v New York City Tr. Auth.*, 27 AD3d 302, 302 [1st Dept 2006] [order denied where one and one-half year delay without any justification while petitioner "was vigorously pursuing Workers' Compensation disability benefits . . . in [an] amount potentially considerably in excess of the settlement amount"]). Utica does not dispute plaintiff's assertions concerning his attempts to settle the lien, beginning in 2016. There is also nothing in the record demonstrating delay occasioned by dilatory tactic. Where plaintiff's success in the litigation before the WCB, with its overlapping issues,[7] likely would have obviated his need for this application, plaintiff's reason for the delay will not be deemed negligent.

[7] The parties' proceedings before the WCB were still ongoing when the petition was filed, but are now resolved (NYSCEF Doc. No. 50).

Plaintiff argues that Utica has not suffered prejudice because the proposed settlement funds remain in a qualified settlement fund from which the Carrier can be reimbursed for the applicable lien. Utica argues that plaintiff has failed to demonstrate lack of prejudice in light of the extent of the proceedings to date, suspension of Utica's payments to plaintiff for over a year, and the Carrier's expense in litigating this matter. WCL§ 29 (5) concerns reimbursement to the insurance carrier (*see Meachem v New York Cent R. Co.*, 8 NY2d 293, 297 [1960] ["The sole purpose of [WCL § 29 (5)] is to prevent imprudent settlements of suits by the employee . . . to the prejudice of the [carrier's] rights"]; *Fidelity & Guar. Ins. Co. v DiGiacomo*, 125 AD3d 596, 598 [2d Dept 2015] [section "was enacted to protect an insurance carrier from paying a deficiency between the settlement and the amount paid to the injured party"]). As courts look to potential carrier reimbursement as the measure of prejudice, Utica does not sufficiently demonstrate prejudice (*see e.g. Lindberg v Ross*, 105 AD3d 1186, 1188 [3d Dept 2013] [no prejudice as lienor retained right to offset future benefits]; *Merrill v Moultrie*, 166 AD2d 392, 392 [1st Dept 1990] [no demonstration of prejudice where settlement was for insurance policy limits]).

WCL § 29 (5) provides that the papers submitted "consist of the petition, the affidavit of the attorney, and the affidavit of one or more physicians," and that these documents contain certain information enumerated in the provision. Utica argues that plaintiff's application is deficient because it does not include: (1) petitioner's name and address; (2) the nature and extent of the damages he sustained; (3) the terms of the retainer and the proposed settlement; (4) an affidavit by plaintiff's attorney outlining the services rendered and the terms of retention; and (5) a physician affidavit setting forth the period of treatment, extend of injuries and the cost of treatment. Plaintiff has submitted the Settlement Documents, his counsel's affidavit stating the

specific dollar figures for the gross amount of plaintiff's potential settlement allocation from the qualified settlement fund, and what plaintiff would retain after deduction of attorneys' fees and lien monies to Utica for the cost of removal of the stimulator. Plaintiff's counsel also supplied, among other things, his hire date, the conditions under which he would obtain a fee, and the fee amount. Plaintiff has not provided a physician affidavit, but he submits copies of medical records that address the insertion and removal of the stimulator, and some progress notes.

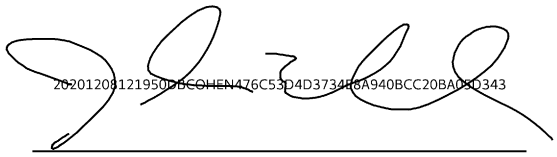
WCL § 29 (5) is not intended to be applied in an "overly legalistic" manner and courts construe the injured party's burden liberally (*see Matter of Spurling v Beach*, 93 AD2d 306, 308-309 [3d Dept 1983] [papers revealed technical errors and omissions but were sufficient]; *see also Neblett v Davis*, 260 AD2d 559, 560 [2d Dept 1999] [granting settlement approval where record contained a physician letter and records containing most of the medical and treatment]; *Merrill,* 166 AD2d at 392 [although papers revealed technical omissions, there was satisfactory compliance]; *Wiechec v Dolina*, 29 Misc 3d 1234(A), 2010 NY Slip Op 52141[U], *6 [Sup Ct, Erie County 2010] [WCL § 29 (5)'s purpose is "not to trap unwary litigants or their counsel into an unwitting forfeiture of workers' compensation benefits"]). Utica acknowledges that courts have accepted medical records and physician letters in lieu of a physician affidavit but argues that plaintiff's showing is insufficient. Indeed, plaintiff's initial submission of medical records was sparse. However, Utica does not show that, under the circumstances here, where the alleged stimulator injury is discrete, occurred years after the injury that occasioned plaintiff's workers' compensation award, and where the stimulator was removed over a decade ago, that additional records are needed for the court to determine the fairness of the settlement (*see Meachem,* 8 NY2d at 297; *Merrill,* 166 AD2d at 392). Under the totality of the circumstances, plaintiff's showing is sufficient.

As Utica is neither a party to this action, nor sought to be joined as a party, its venue argument is unpersuasive. No determination is made here as to the effect, if any, of this court's approval order on any past or future WCB decision.

Accordingly, it is hereby

ORDERED that Utica's motion to dismiss the petition is denied; and it is further

ORDERED that plaintiff's motion (motion sequence no. 004) for a determination that Workers Compensation Law § 29 (5) does not apply to plaintiff relating to this action, or for a compromise order approving plaintiff's proposed settlement with defendant pursuant to WCL § 29 (5), or for an order approving plaintiff's settlement with defendant nunc pro tunc is granted only to the extent that plaintiff's motion for an order granting nunc pro tunc approval of the settlement between plaintiff Robert MacWhinnie and defendant Advanced Neuromodulation Systems, Inc., d/b/a Advanced St. Jude Medical Neuromodulation Division, as reflected in the "Master Compromise, Settlement, Release and Indemnity Agreement for the Settlement of the Claims of the Clients of Chaffin Luhana LLP Regarding St. Jude Medical Spinal Cord Stimulator Products," the "Confidential Settlement Agreement and Release of all Claims," and the May 30, 2019 affirmation of Roopal P. Luhana, all filed herein, under seal, is granted and the motion is otherwise denied.



12/8/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE