No. 126730

In the

# Supreme Court of Illinois

CLIFTON ARMSTEAD,

*Plaintiff-Appellant,*

vs.

NATIONAL FREIGHT, INC. d/b/a NFI INDUSTRIES, INC. and DERRICK ROBERTS,

*Defendants-Appellees.*

Appeal from the Illinois Appellate Court,
Third Judicial District, Nos. 3-17-0777 consolidated with 3-18-0009.
There Heard on Appeal from the Circuit Court of the Thirteenth Judicial Circuit,
Grundy County, Illinois, No. 2016 L 21.
The Honorable **Lance R. Peterson**, Judge Presiding.

## BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CLIFTON ARMSTEAD

MICHAEL W. RATHSACK
*Attorney for Plaintiff-Appellant*
10 South LaSalle Street
Suite 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

*Of Counsel:*

ADAM J. ZAYED
and
MICHAEL W. RATHSACK



**ORAL ARGUMENT REQUESTED**

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

# TABLE OF CONTENTS
# and
# STATEMENT OF POINTS AND AUTHORITIES

## NATURE OF THE CASE

Clifton Armstead underwent knee and back surgery after being rear-ended by a National Freight truck. He filed a worker's compensation claim in Pennsylvania and he and his employer entered into a settlement for $110,000 where they listed the injury as a knee strain and said he had not sustained other injuries. The agency order approving that agreement said it was "approved as binding only on the signing Parties and limited to their respective rights and obligations under the Act." The order was "entered without adoption or litigated determination on the merits of the matters agreed upon" and was "not to alter rights or obligations of any third party not a signatory to the Agreement."

Armstead also sued National Freight and its driver. Defendants sought partial summary judgment, arguing that the language in the Pennsylvania agreement describing the injury constituted a judicial admission or collaterally estopped Armstead from seeking damages for any injury other than the knee strain. The trial court rejected collateral estoppel but granted partial summary judgment based on the alleged judicial admission. The appellate court initially reversed, finding no judicial admission. On reconsideration, it held that the agreement's language describing the injury collaterally estopped Armstead from seeking damages for anything beyond the strained knee. The opinion is in the Appendix.

No questions are raised on the pleadings.

## ISSUES PRESENTED FOR REVIEW

The order approving the Pennsylvania workers' compensation settlement agreement said it was "approved as binding only on the signing Parties and limited to their respective rights and obligations under the Act," and "entered without adoption or litigated determination on the merits of the matters agreed upon." It was "not to alter rights or obligations of any third party … ."

The issues presented for review are:

I. Whether National Freight can use the agreement's description of the injury to collaterally bar Armstead from seeking compensation for injury beyond that described in the agreement when the Pennsylvania agency approving the settlement did not decide that issue;

II. Whether there was a judgment on the merits in the Pennsylvania proceeding, that being a prerequisite for collateral estoppel;

III. Whether the above proscriptive language prevents using the agreement's description of the injury for collateral estoppel purposes;

IV. Whether collateral estoppel is inappropriate because Plaintiff did not have motivation to vigorously litigate the nature of his injury in the Pennsylvania proceeding, and

V. Whether public policy militates against applying collateral estoppel in a situation like this where its use will unnecessarily burden the operation of the Illinois Workers' Compensation Commission and those practicing there.

## STATEMENT OF JURISDICTION

The court granted partial summary judgment to National Freight based on a purported judicial admission. C288; R31-35. The appellate court initially reversed on January 17, 2019, finding no admission. It ordered publication on February 5, 2019. National Freight timely moved for reconsideration. The court granted the petition for rehearing on March 5, 2019, and this time affirmed the summary judgment on November 20, 2020.

This Court granted Plaintiff's motion to extend the due date for his petition for leave to appeal to January 8, 2021, and Plaintiff filed his petition within that time. The Court allowed review and has jurisdiction pursuant to Rule 315.

## STATEMENT OF FACTS

Clifton Armstead filed for workers' compensation benefits against his employer Manfredi Mushroom in Pennsylvania in 2015 for injuries received in a vehicle accident here in which he was rear-ended by a National Freight truck. He also filed this lawsuit in 2016 against National Freight and its driver Derrick Roberts. C9.

### *The Pennsylvania settlement agreement*

Armstead and his employer entered into a settlement agreement in his Pennsylvania workers' compensation matter which was approved in an order of a Workers' Compensation Judge on November 9, 2016. C100 (package of settlement documents); App. at A7. The package includes a two-page cover letter, an Adjudication Under Section 449 with Findings of Fact and Conclusions of Law (C102), an Order (C103), and a Compromise and Release Agreement referred to as a C&R Agreement (C104). Because the language there is critical to the parties' arguments, Plaintiff recites the significant sections.

The Findings of Fact in the order report that the C&R Agreement was submitted for approval, adding that the Agreement may have been modified or amplified at the approval hearing and that any such changes are incorporated into the Agreement. App. at A9. The Order section similarly approved the Agreement as it may have been modified. App. at A10.

The Adjudication document (App. at A9) approving the settlement included the following language under Conclusions of Law:

> **ADJUDICATION UNDER SECTION 449**
> (Approval of Compromise & Release Agreement)
>
> * * * *
>
> **CONCLUSIONS OF LAW**
>
> The parties have complied with Section 449 of the Act and the Agreement as referenced of record is appropriately approved as binding only on the signing Parties, and limited to their respective rights and obligations under the Act. This Decision was entered without adoption or litigated determination on the merits of the matters agreed upon, and is not to alter the rights or obligations of any third party not a signatory to the Agreement. C102: App. at A9.

As noted, the C&R Agreement signed by Armstead and his employer was attached to the Adjudication document approving the settlement. Counsel in this case agreed that settlement agreements or settlement contracts in Illinois workers' compensation cases do not contain such language. R18-19.

The C&R form instructed the parties to describe the nature of the injury that was the subject of the settlement, as follows:

> 4. State the precise nature of the injury and whether the disability is total or partial.
>
> A. "Right knee strain. The parties agree that Claimant did not sustain any other injury or medical condition as a result of his 06/06/2015 work injury." C104; App. at A11.

As of that date, Armstead had not received any benefits, either for wage loss or otherwise. App. at A11 (No. 5).

The total cost of the settlement was $110,000. App. at A12. The employer was only liable for medical bills related to the knee injury. App. at A12 (No. 10). The employer or its carrier had an actual or potential lien for subrogation and reserved its right of subrogation. App. at A12 (No. 11). The payment represented payment of future workers' compensation wage indemnity claims as compensation for impairment of Armstead's remaining lifetime earning power. App. at A13 (No. 13).

The C&R form instructed the parties to state the issues involved and the reasons why they entered into the settlement agreement, and that was listed as follows:

> 16. State the issues involved in this claim and the reasons why the parties are entering into this agreement.
>
> A. "Whether the Claimant understands the legal significance of entering into this Agreement." C107; App. at A14.

### *Alleged Injuries*

Armstead's interrogatory answers filed here in 2016 described injuries to his knee and lower back. C341. His counsel later described the knee injury as ultimately being diagnosed as a medial meniscus tear. C348. The trial court at one point noted National Freight's counsel told the court earlier that there had been claims of back and shoulder injury. R22. Defense counsel told the court he had reviewed Armstead's medical records and that Armstead's complaints of low back pain occurred both before and after this accident. R23.

The trial court understood there were claims of injury to the back and shoulder, in addition to the knee, as seen in the following exchange:

> The Court: "Is there any medical before the settlement agreement?"
>
> Mr. Zayed: "Was there any medical?"
>
> The Court: "Any medical evidence . . . to support that he was claiming . . . back and shoulder injury?"
>
> * * *
>
> The Court: * * * "All I am saying is the reason that it can become relevant is that it isn't just the first time that there was never any mention of back and shoulder. That's clearly not true. There was mention of back and shoulder injury. The validity of that and how things would shake up evidentiary wise, I'm not going to judge that today, but it is at least relevant to a couple of the analyses that it was brought up. It was raised. It was not something that no one ever mentioned had never came up until he filed his complaint here in Illinois". R22-24; App. at A20-A22.

Defense counsel reported that Armstead's medical treatment occurred on the East Coast. R27. Both counsel reported to the court that Armstead had undergone a back fusion before this accident and that he was set to undergo a revision of the fusion shortly after the first hearing on Defendants' motion. R27-28.

### *Disposition in the trial court*

National Freight moved for partial summary judgment. C82. Citing the Pennsylvania agreement, it argued the description there of a knee strain as the only injury constituted a judicial admission that Armstead sustained no

other injury. It additionally argued that collateral estoppel barred consideration of any injury other than the knee strain.

The trial court's analysis began early in the hearing where, responding to defense counsel's contention that the agreement was a final adjudication of the rights of the parties, it noted the agreement said "we didn't litigate this; this is not a final determination on the merits." The trial court emphasized "That's what it says." R17-18.

When defense counsel persisted, the judge told him to stop because counsel could not say the agreement was an adjudication (just) because that judge said so. The court noted it was the judge in Pennsylvania who had used this language, meaning the phrase "without adoption or litigated determination on the merits." The trial court said the compensation judge had in essence said he was "not making any final determinations of fact." R18.

The trial court went on with respect to this issue, saying:

> You're asking this Court to adopt and say because a judge said so in another state the issue is precluded. The problem is the very judge you're asking me to resolve this issue in a perfunctory fashion, the same judge said don't do that. This is not a final determination. It's part of his judgment. What this says is apparently in Pennsylvania they have a different approach to work comp and they have language that says this does not impact any matters that would apply to third parties and it's not a final determination on the merits."
>
> * * *
>
> * * * I have to deal with - - this language is clear and unequivocal and I'm going to abide by it." R19-20.

The court said it would not do the opposite of the Pennsylvania judge's clear and unequivocal language. R20. It denied collateral estoppel, pointing to the language in the agreement/order stating that "it is not a judgment on the merits, that the matters were not litigated (and) res judicata makes it clear it should not be considered a final adjudication on the merits. There was no litigation. The language speaks for itself." R31-32.

After denying collateral estoppel, the court granted partial summary judgment based on what it said was a judicial admission, limiting Armstead's damages to a strained knee. C288; R31-35.

*Disposition in the appellate court*

The appellate court initially reversed and remanded on January 17, 2019, finding no judicial admission. It ordered publication on February 5, 2019, and Defendants petitioned for rehearing. The court granted that petition on March 5, 2019, with additional briefing concluded on April 19, 2019. A year and a half later, it reversed. App. at A1. It declared Plaintiff was collaterally estopped from seeking damages for anything other than a knee strain.

The court declared that the issue in the Pennsylvania compensation proceeding was identical to the issue here and that the settlement there "resolved" the issue of the extent of injury. App. at A5. It said the agreement "set" the parties' rights and thus qualified as a judgment on the merits. It relied on *Talarico v. Dunlap*, 177 Ill. 2d 185 (1997), but declined to apply that

opinion's rule that the finding in the prior case must be the result of "actually" litigating the issue.

The court further held that Armstead had both the incentive and the opportunity to litigate the extent of his injuries in the workers' compensation proceeding. App. at A5. For that part of the court's decision, the court *sua sponte* concluded that Armstead "perhaps" lacked incentive to litigate the back injury claim because an independent medical examiner's opinion in the compensation proceeding (C372) made "clear" he would not obtain compensation for that injury. App. at A5. National Freight's summary judgment motion and its reply in support of that motion had not relied on that report. C82, C163. That medical report came up only in National Freight's response to Plaintiff's motion for reconsideration of the summary judgment. C353 (response), C272 (report).

The opinion also emphasized that the so-called independent medical examiner had opined that the available information did not indicate Armstead injured his back. The appellate court erroneously assumed that the doctor reporting was truly independent and that his report would consequently be deemed conclusive. The court went so far as to conclude "it was clear from the * * * examiner's opinion that plaintiff would not successfully obtain compensation for the claimed injury." App. at A5. The premise for that part of the decision is demonstrably incorrect: employers choose and pay the doctors conducting such exams. 77 P.S. § 651. Plaintiff did not have the opportunity

to bring that error to the panel's attention because Rule 367(e) allows only one petition for rehearing.

The opinion also denied application of that part of the Adjudication providing that the agreement was not a decision on the merits and did not alter the rights or obligations of any third party. App. at A6. Although the restrictive language was included by the court rather than the parties, the appellate court first expressed doubt about whether parties to such agreements even have a right to limit the effect of their agreement. The court then noted the order's provision that it did not alter the "rights or obligations" of any third party and concluded that the parties intended that provision to protect National Freight's right to raise collateral estoppel if one of the parties sued it. The court did not address the companion part of that phrase, "obligations", or the potential that the parties meant to secure their right to enforce the tort obligations of National Freight created by its driver's negligence.

Finally, the court ruled that *Talarico's* equitable fairness prerequisite was met because Armstead had the "opportunity to litigate the extent of his injuries" in the compensation proceeding. App. at A6. It did not address *Talarico's* rule that a "fair opportunity to litigate" means not just motivation to litigate but rather motivation to "vigorously" litigate, or *Talarico's* direction that courts must also consider the "practical realities of litigation."

## ARGUMENT

### Standard of Review

Plaintiff Clifton Armstead appeals from the order granting partial summary judgment to defendant National Freight, limiting his tort claim to damages for a strained knee. That presents a question of law, and the standard of review is *de novo*. *Delaney v. McDonald's Corporation*, 158 Ill.2d 465, 634 N.E.2d 749, 750 (1994). That rule applies in cases like this where summary judgment is based on collateral estoppel. *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 158, 940 N.E.2d 1122, 1127 (2010)

Summary judgment is not to be granted unless the right of the moving party is free and clear from doubt. *Purtill v. Hess*, 111 Ill.2d 229, 489 N.E.2d 867, 871 (1986). Where doubt exists, the wiser judicial policy is to permit resolution of the dispute by trial. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 633 N.E.2d 627, 630 (1994).

The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. *Hexacomb Corp. v. Corrugated Sys., Inc.*, 287 Ill. App. 3d 623, 631–32, 678 N.E.2d 765, 771 (1997).

### Argument

### Summary of Argument

The appellate decision conflicts with almost every element this Court established in *Talarico v. Dunlap*, 177 Ill. 2d 185, 191–92, 685 N.E.2d 325

(1997) as a prerequisite for applying collateral estoppel. Collateral estoppel is an equitable remedy and is appropriate only if: (1) the issue decided in the prior adjudication is identical to the issue in the current suit; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Id.* at 191–92. In addition, *Talarico* clarified that a decision on the issue must have been necessary for the judgment in the first litigation and the party charged with estoppel must have actually litigated the issue. Finally, even if a party satisfies the threshold elements, courts are not to apply the doctrine unless it is clear no unfairness will result. *Id.*

National Freight did not establish the first element because the Pennsylvania proceeding did not decide or adjudicate the extent of Armstead's injuries. It did nothing more than approve an agreement. The second element was not met because the order approving the settlement was not a final judgment on the merits. In addition, a decision on the nature of the injuries was not necessary as a prerequisite to approval of the settlement. The nature of the injuries was not litigated, and Armstead had no motivation to vigorously litigate the nature of his injuries.

Finally, it was unfair to both Armstead and his employer (who lost the right to subrogation) to apply collateral estoppel because they gained nothing by the description of the injury in their agreement. Applying estoppel was also unfair because it provided a windfall to the tortfeasor, National Freight. That

contradicts public policy which normally seeks to make tortfeasors liable for injuries they cause.

### *I. The Pennsylvania workers' compensation judge did not decide anything. Consequently, the case does not fulfill the requirement that the issue decided in the prior adjudication be identical to the issue decided in the current action.*

The first question is whether the Pennsylvania judge decided an injury issue. The circuit court said no, because nothing was litigated there. It rejected National Freight's estoppel claim because the Pennsylvania order specifically said it was not a judgment on the merits. R31. The trial judge pointed out that the Pennsylvania judge's order essentially said, "we didn't litigate this; this is not a final determination on the merits," emphasizing "That's what it says." R17-18. The court said it would not do the opposite of the Pennsylvania's judge's clear and unequivocal language. R20.

Relying on the order's restrictive language, the trial court reiterated that the Pennsylvania order was "not a judgment on the merits, that the matters were not litigated (and) res judicata makes it clear it should not be considered a final adjudication on the merits. There was no litigation. The language speaks for itself." R31-32.

The appellate court disagreed but did not consider the effect of the fact that the Pennsylvania proceeding did not decide anything. That meant National Freight did not meet even the first prerequisite for collateral estoppel.

To decide means to have someone with authority resolve a conflict by choosing between two positions. An agreement, as occurred in the

Pennsylvania proceeding, is not a decision: it is just an agreement. The parties agreed to a settlement, nothing more; the judge in approving it did not choose between two positions. What Armstead and his employer agreed to there might ultimately constitute an evidentiary admission, but that is irrelevant for our purposes where the focus is on collateral estoppel.

For collateral estoppel, National Freight must prove a decision, meaning it must appear clearly that the identical and precise issue here was decided there. *Talarico v. Dunlap*, 177 Ill. 2d 185, 191, 685 N.E.2d 325, 328 (1997). National Freight had to show a finding of a specific fact in that matter that was both material and controlling there and also material and controlling here. And that "fact" must have been so in issue there that it was necessarily decided by the Pennsylvania judge. *Hexacomb Corp. v. Corrugated Sys., Inc.*, 287 Ill. App. 3d 623, 631–32, 678 N.E.2d 765, 771 (1997).

If there was no decision there, by definition there was no adjudication, and without an adjudication there cannot be estoppel. The only adjudication there was approval of the C&R agreement; the judge was not asked to "decide" what injury occurred. That reasoning is seen in the analysis in *Pinkerton Sec. & Investigation Services v. Illinois Dept. of Human Rights*, 309 Ill. App. 3d 48, 58, 722 N.E.2d 1148, 1155 (1999), where the court considered what constituted an agency decision. It concluded that a determination of liability by default without determining damages was not a decision "which affects the legal rights, duties or privileges of parties and which terminates the proceedings."

Black's Law Dictionary similarly defines "decision" as a judicial determination after consideration of the facts and the law, especially a court order issued when considering or disposing of a case. That did not occur here.

In the same vein, when considering the meaning of a "judgment on the merits," this Court said that means a decision on the merits, and for a decision to be on the merits, there must be a complete determination of liability based on the evidence. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 22, 981 N.E.2d 951, 959. The Court was looking at a different term there (judgment on the merits), but its analysis implicitly assumed that a decision was an order addressing and deciding a claim's merits, not a procedural or technical determination. Again, the former is not what occurred in Pennsylvania. The latter is a better description of what occurred there and that is not a decision.

### *II. Collateral estoppel is also not applicable because there was no judgment on the merits in the Pennsylvania proceeding.*

In any event, there was no adjudication of the injury issue in Pennsylvania, and surely no final judgment on the merits, because that order specifically provided it was "entered without adoption or litigated determination on the merits of the matters agreed upon," including the description of the injury. C102; App. at A9. The workers' compensation judge approved the settlement, nothing more. He did not reach the merits of that case. The quoted language from the order constituted a finding that the order

and the attached document did not represent a litigated determination of the merits of the case, a fundamental requirement for collateral estoppel.

The appellate court disagreed, saying only a prior adjudication is required, not litigation. App. at A5 (¶ 27). But as noted, the only point adjudicated was that the contract was approved. And as the Court noted in *Mashal*, a final judgment requires a determination of liability and remedies. *Mashal, supra* at ¶ 25. Nothing about the Pennsylvania order looks like either of those two things.

In declaring the settlement to be a judgment on the merits, the appellate court relied primarily on *Richter v. Vill. of Oak Brook*, 2011 IL App (2d) 100114, ¶ 27, 958 N.E.2d 700, 712, after noting that *Richter* relied on *Stromberg Motor Device Co. v. Indus. Comm'n*, 305 Ill. 619, 621–22, 137 N.E. 462, 463–64 (1922). But *Stromberg* did not mention collateral estoppel. It only addressed a section of the Workmen's Compensation Act allowing Commission review of both agreements and awards where the employee's condition has changed. For purposes of that statute, settlements and awards are both deemed binding on the parties for purposes of further review. The Court did not hold that all recitations in all compensation settlement contracts are always binding in every subsequent action, including third party actions like this.

*Richter* itself was strategically different. There, the plaintiff-employee obtained multiple workers' compensation benefits and then sued his employer

for health insurance and for a pension for the same injuries. The question was whether the injury was work related; the plaintiff contended their settlement contract in the workers' compensation case prevented the employer from later claiming the injury was not work related. The Court allowed the plaintiff to use offensive collateral estoppel to prevent the employer from contesting whether the injury was job related because the employer had not provided authority for its contention that the prior agreement was not a judgment on the merits. *Richter, supra* at ¶ 18.

Here, Armstead relies on the language in the Pennsylvania order precluding that order's use for purposes like collateral estoppel. There was nothing like that in *Richter*. *Richter* also relied on the fact that, unlike this case, that defendant admitted the earlier order was a final adjudication on the merits. *Id.*

Further, although *Richter* acknowledged *Talarico's* emphasis that collateral estoppel is an equitable doctrine, it is inapposite because it rejected *Talarico's* broad concern with fairness. *Id.* at ¶¶ 25, 27. *Richter* said unfairness rests only on either inadequacy of the forum or a scenario where the person sought to be bound was not motivated to litigate the issue in the earlier case. Even if the role of unfairness is so limited, Armstead had no such motivation. In fact, as discussed below, the Pennsylvania document specifically told him nothing was being litigated and that it would not affect any claims against third parties (like his tort claim against National Freight).

Consequently, no person in Armstead's shoes would have anticipated that the Pennsylvania order and the attached agreement would bar a different claim against a third party in another forum.

In addition, the equities are different between the two cases. Courts should not hold a personal plaintiff, as in this case, to the same standard as the sophisticated municipal employer in *Richter*, especially where the two cases involve different parties, different issues, and even different forum states. The Court in *Richter* was also influenced by the fact that the defendant seeking to apply collateral estoppel was itself a party to the workers' compensation case. *Id.* That was not the situation here.

### *III. The proscriptive language in the Pennsylvania order prevents its use to support collateral estoppel here.*

A further factor distinguishes this case from *Richter* and any other authority relied on by the appellate court or National Freight. That is the order's provision limiting its effect to the two parties entering into the agreement: Armstead and his employer, Manfredi Mushroom. The order approving the settlement specifically limited its effect to the signers of the agreement. It provided that the agreement was "appropriately approved as binding only on the signing Parties, and limited to their respective rights and obligations under the Act." The order further said it was "not to alter the rights or obligations of any third party not a signatory to the Agreement." C102: App. at A9.

The order's plain language thus says the agreement was binding only on Armstead and Manfredi and was not to alter anyone else's rights or obligations. That limitation likely reflected what is described in Point V below about the settlement process at such agencies. Such settlements are processed in large numbers and neither the parties nor the agencies are particularly concerned about or affected by much of their content, nor do they have time to be. Sheer volume militates against such concern to details. The agreement's key points are the amount, who pays and when.

The appellate court did not directly confront the order's language limiting the effect of the agreement's provisions to its parties. It addressed that language only indirectly, saying that "even if one could contract around this law", meaning contracting around collateral estoppel, the order's further language restricting its effect was for the benefit of third parties. Before addressing the court's reasoning about that last statement, Plaintiff will address that pregnant comment about the right to contract away an agreement's effect.

First, despite the comment's obviously negative tenor, the appellate court did not preclude parties to an agreement from limiting the effect of their agreement to themselves. More importantly for understanding how the court erred, that comment reflects that the court did not appreciate what actually occurred in Pennsylvania. Its misunderstanding undercuts the rationale for its decision to ignore the order's proscriptive language. The court conflated the

order and the agreement. National Freight set the stage for that conflation in its trial court reply. Even though it acknowledged that the restrictive language was in the order, it said there, without citation to authority, that a third party's rights cannot be governed by a contract which it did not sign. C166.

This is not a situation where the parties contractually agreed to limit use of the agreement's terms for purposes like collateral estoppel, so this Court need not consider whether that is legally permissible. Rather, it was the Pennsylvania court itself that limited the order's effect, including the agreement attached to it. No one has cited authority for the proposition that a judge, administrative or otherwise, approving a document cannot determine that under the circumstances, the effect of its order approving the document is limited to the parties before it. The point is that the likely premise for the appellate court's rejection of the proscriptive language, i.e., its doubt that parties to an agreement can limit its effect to avoid collateral estoppel, was incorrect. The key proscriptive language was in the order, not the agreement.

Plaintiff now turns to the order's language saying it bound only the parties and was limited to their respective rights and obligations under the Workers' Compensation Act. The appellate court turned that language on its head, reasoning that the judge there intended to give a third party like National Freight the right to raise collateral estoppel to defeat both Plaintiff's tort claim and his employer's subrogation rights. The appellate court took language intended to be a shield and turned it into a sword to be brandished

by tortfeasors who were not parties to the agreement. The court thus thwarted the Pennsylvania judge's intent when he approved the agreement but limited its effect to its parties.

Plaintiff cannot find a case denying a court's right to make such a finding. The approving judge likely limited the reach of its order because he had a real-world appreciation of how such agreements were arrived at. No matter the reason, the full faith and credit provision of the Constitution requires this State to honor that court's findings. U.S.C.A. Const. Art. IV § 1.

By refusing to enforce the proscriptive language, the decision prevents courts reviewing compensation cases from inserting language to avoid this new issue. That will in turn make reaching settlements more difficult because parties will be forced to debate and reach agreement on matters not critical to consummation of the settlement for fear that something thought not to be critical at the time could pop up later to block some further action like this pursuit of the tortfeasor. That public policy factor further weighs in favor of rejecting blanket use of collateral estoppel in this situation.

### *IV. Collateral estoppel does not apply because Plaintiff had no motivation to litigate the nature of his injury in the Pennsylvania proceeding.*

In reversing the trial court's rejection of collateral estoppel, the appellate court said National Freight as the proponent of estoppel need show only that Armstead had a *fair opportunity to litigate* in the Pennsylvania proceeding, not *a motivation to vigorously litigate*. That contradicted

*Talarico's* holding that courts must consider "the absence of an *incentive to vigorously litigate* in the former proceeding" before applying estoppel. *Talarico, supra* at 192 (emphasis added).

The court's failure to follow that directive from *Talarico* was critical because the evidence showed Armstead had no motivation to litigate his injury's details, and certainly no motivation to vigorously litigate. The nature of the injury was not at issue. He was to receive $110,000, an amount both sides deemed fair under Pennsylvania standards governing damages in workers' compensation cases, regardless of how they jointly agreed to describe his injuries. Both Armstead and his employer knew they could then seek compensation and/or indemnity from tortfeasor National Freight, and both surely assumed their agreement along with the language in the order approving the agreement allowed them to do that. The fact the employer paid $110,000 for what they jointly agreed to describe as a sprained knee shows that both parties and the reviewing compensation judge surely knew there was more to the injury than what was printed there.

In addition, Armstead was out of work (C373) and had not received any benefits whatsoever for a year and a half (C104, App. at A11). Consequently, he was likely mostly motivated to sign whatever document would complete the settlement without checking it closely or contesting the accuracy of any of its content. People in his position are not in position to "vigorously litigate." That

is part of the "practical realities" of litigation that *Talarico* said courts must consider before applying collateral estoppel. *Id.* at 192.

The appellate court's further error was its implicit assumption that Armstrong should have been motivated to list his more serious injuries in the agreement because if he had done that, the court thought that would have somehow translated into a higher offer of settlement, or that he would have gotten more money by litigating rather that settling. However, the court had no basis for that assumption. Significantly, the court arrived at its conclusion about what would have resulted if Armstead had insisted on an accurate description of his injuries or had proceeded to hearing *sua sponte*. The court's assumption that was the basis for its belief that Armstead had a motivation to litigate was speculation.

The court apparently did not appreciate how workers' compensation actually works. Compensation in workers' compensation proceedings is generally governed by standards setting out what is to be paid for various types of injury. The idea is to make the outcome predictable, avoiding litigation and getting compensation to the worker in short order. Once the parties arrive at a figure predicted by those rules, neither side has any motivation to litigate the amount and/or to list injuries more specifically.

Further, in overruling the trial court and applying estoppel, the appellate court also concluded *sua sponte* that Armstead settled for the injuries listed rather than litigating because it was "clear," at least to the appellate

court, that Armstead knew he would lose if he litigated. Its basis for its conclusion was the opinion of Dr. Fras, characterized as an independent medical examiner. *Armstead, supra* at ¶ 29. The court's conclusion on this point appears to have been critical to its overall decision to apply estoppel because it spent a fair amount of effort on the point. However, the court was incorrect about the independence of Dr. Fras. Plaintiff had no opportunity to correct that misstatement because Rule 367(e) allows only one petition for rehearing.

In Pennsylvania, such medical examiners are chosen and paid by employers: their opinions are hardly conclusive. 77 P.S. § 651. That was illustrated in *Hernandez v. Workers' Comp. Appeal Bd.* (F&P Holding Co.), 190 A.3d 806, 807 (Pa. Commw. Ct. 2018), where the court noted the *employer* sent the employee to a doctor, ironically Dr. Fras, for an "independent medical exam." That employers and their carriers control such witnesses is also reflected in the notice to Armstead to see Dr. Fras for an examination; it says it was confirming the examination *on behalf of* AIG, the compensation carrier. C2648. The same management company similarly sent him for another IME *on behalf of* AIG. C264.

National Freight, in opposing reconsideration of the trial court's order, objected to Plaintiff's attempt to cite his deposition where he had described his full injuries and the surgeries for those injuries. C353 (motion), C337 (deposition). But National Freight itself recited some of the findings of Dr.

Fras to the trial judge. C361. Fras' report listed Armstead's various injuries and his surgeries.

The point is that a close reading of his discussion of the injuries shows Dr. Fras was anything but an independent examiner. He read other reports to say there was no pain even though the doctor there had recorded complaints of pain. C376 (second to last paragraph). His review included looking at things like Commission notices and decisions, matters of no concern to a physician performing a truly independent medical exam. C375. In the same vein, Fras' report included the statement that "Failure to comment on a particular record does not imply a lack of importance attached to such a record nor a lack of consideration given to such a record." C376. Such language is surely not consistent with an unbiased exam but rather reflects a doctor well versed in litigation strategy. And after saying without explanation that the origin of a meniscus repair six months after the accident was somewhat ambiguous, he said Armstrong was fully recovered despite also acknowledging that he could not exclude trauma as a cause. C378. Again, all that is surely indicative of a retained biased expert, not an independent expert.

Thus, a key basis for the appellate court's rejection of estoppel, its belief that Armstead settled because he knew he would lose due to Dr. Fras' report, is demonstrably in error.

Even if the Court concludes that Armstrong had motivation to litigate the injuries in Pennsylvania, that does not end the analysis required by

*Talarico*. The "incentive to litigate" element allows even a party who actually litigated an issue in the prior case to relitigate that issue if he or she can show the original litigation was a side show rather than a "struggle to the finish." *Talarico, supra* at 196. In such a situation, that party may still rebut any inference drawn from the fact that the issue was actually litigated, i.e., the inference that the party had treated the issue seriously in the first case. That was the situation here in Pennsylvania where the record shows the focus was on the settlement and payment of the settlement, not the precise injury. The description of the injury was at best a side show and thus not controlling.

## *V. The public policy rationale of Talarico is best satisfied by recognizing that applying collateral estoppel in this kind of case will unnecessarily complicate the negotiation of Workers' Compensation claims and work an unfairness on Mr. Armstead while providing a windfall to National Freight.*

*Talarico* utilized a practical analysis, looking at policy in settlement procedures. It reasoned that applying criminal plea agreements blindly in later civil cases, rather than looking behind the curtain of the negotiated plea, would force those involved to take every issue to trial. *Id.* at 199. The same is likely to be true in cases like this if the decision is allowed to stand because its reasoning applies to all workers' compensation proceedings. One effect will likely be a need to add to Commission settlement contracts the type of preclusive language used in this Pennsylvania contract. And one of the first questions in that process will be whether such restrictions are even enforceable under this decision.

At a minimum, opposing parties in thousands of Illinois compensation claims will be forced to come up with or at least consider mutually acceptable descriptions of injuries to avoid collateral estoppel if there is any potential for a third party recover against the culpable tortfeasor. All that will not change the outcome in the compensation case and will thus serve no useful social or judicial purpose.

Up to this point in the history of Commission proceedings, parties and their counsel at the Illinois Workers' Compensation Commission have not had to pay particular attention to the contents of settlement agreements. Such agreements are routinely presented to arbitrators and commissioners for review and approval. It is likely correct that parties there believe that accepting workers' compensation benefits from an entity will estop that claimant from later claiming the entity paying that compensation was not an employer. But there has been no need for lawyers to parse every sentence and check the accuracy of every recitation in such agreements.

If the appellate court's construction of the preclusion provision in the Pennsylvania order stands, that new rule binding employees and employers to every statement in a settlement contract will change the playing field at the Commission. Employers will be equally affected because applying collateral estoppel will also block their right to subrogation. Employers or their insurance carrier often have actual or potential liens for subrogation; the agreement here specifically noted such rights. App. at A12.

Such Commission settlement proceedings are typically *pro forma* both in Pennsylvania and in Illinois. That has to be the case because Pennsylvania workers' compensation judges and Illinois arbitrators process thousands of such contracts.[1] Pennsylvania's approximately 84 workers' compensation judges handle about 40,000 petitions annually. That site shows about 5000 C&R agreements annually. but its Deputy Secretary reports about 22,000 C&R petitions reviewed annually.[2] More critically for this Court's purposes, Illinois workers' compensation arbitrators review more than 30,000 settlement contracts each year.[3] The reality is that there is very little time to review each such petition.

If counsel and Commission arbitrators must now address injury and medical and payment specifics in each settlement to avoid inadvertently setting up potential collateral estoppel, that will throw a wrench into the cogs of a process that has to date worked to everyone's satisfaction. The prospect of such a need has caused concern across the workers' compensation legal community.

---

[1] 2019 Annual Report, PA Workers' Compensation and Workplace Safety, Office of Adjudication Statistical Review; https://www.dli.pa.gov/Individuals/Workers-Compensation/publications/Documents/2019%20WC%20Annual%20Report.pdf, at 23 (last visited 1/7/21).

[2] Compensation and Insurance , PA Department of Labor & Industry, Scott Weiant, Deputy Secretary; App. at A (20).

[3] Illinois Annual Workers' Compensation Commission Report; https://www2.illinois.gov/sites/iwcc/Documents/FinalAnnualReportFY2019.pdf#search=cases%20closed%20by%20arbitrators, at 7 (last visited 12/28/20).

If collateral estoppel is to be so broadly applied, one solution might be to use limiting language like that in the Pennsylvania order. It would limit the effect of the settlement to the parties involved who would settle knowing and appreciating the legal and factual uncertainties and using terms that allow them to reach a settlement satisfactory to those involved. However, the opinion casts doubt on the ability to even do that because the court refused to give the intended effect to such language. At a minimum, parties in this situation should be allowed to inform the court approving an agreement what parts of their agreements actually reflect information both sides consider so validated that it could be used by others in further litigation, thus avoiding the need to consider the impact of all entries on collateral estoppel.

In the same policy vein, reversal would validate this Court's instruction in *Talarico* that collateral estoppel is to be used sparingly and only when equity requires it. *Talarico*, *supra* at 199-200; *Am. Family Mut. Ins. Co. v. Savickas*, 193 Ill.2d 378, 388, 739 N.E.2d 445, 451 2000). And as part of that policy, similar to what the Court considered in *Talarico*, Plaintiff's point is that reversal will not work an unfairness to National Freight which has not previously been subject to litigation involving this accident. There will not be a duplicate recovery and it will not be exposed to re-litigation. In the same vein, equity favors holding tortfeasors responsible for injuries they cause. If that does not come to pass here, National Freight receives a windfall because it escapes liability by essentially becoming a third-party beneficiary of the

Pennsylvania order and agreement. That was clearly not the intention of that court or the parties to that matter.

## CONCLUSION

For the reasons stated, plaintiff-appellant Clifton Armstead requests that the appellate court decision be reversed and that the summary judgment be reversed, and that the matter be remanded for further appropriate proceedings. In the alternative, plaintiff-appellant requests such other and further relief as may be deemed appropriate.

Respectfully submitted,

/s/ *Michael W. Rathsack*

Michael W. Rathsack
Attorney for Plaintiff-Appellant
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

Of counsel:

Adam J. Zayed
and
Michael W. Rathsack

## CERTIFICATE OF COMPLIANCE

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, I certify that this document conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 31 pages.

/s/ *Michael W. Rathsack*

MICHAEL W. RATHSACK
*Attorney for Plaintiff-Appellant*
10 South LaSalle St. - 1420
Chicago, Illinois 60603
(312) 726-5433
mrathsack@rathsack.net

# APPENDIX

## TABLE OF CONTENTS TO THE APPENDIX

2020 IL App (3d) 170777



Appellate Court of Illinois, Third District.

Clifton ARMSTEAD, Plaintiff-Appellant,

v.

NATIONAL FREIGHT, INC., d/b/a NFI Industries, Inc., and Derrick Roberts, Defendants-Appellees.

Appeal Nos. 3-17-0777
|
3-18-0009
|
Opinion filed November 20, 2020

**Synopsis**

**Background:** Semi-truck driver who was injured in an accident with another semi-truck driver brought an action against the other driver and his employer alleging that the other driver negligently operated his semi-truck at an excessive speed in the course of his employment. The Circuit Court, 13th Judicial Circuit, Grundy County, No. 16-L-21, Lance R. Peterson, J., granted the other driver's and employer's motion for partial summary judgment under doctrine of judicial admission. Injured semi-truck driver appealed.

**Holdings:** On rehearing, the Appellate Court, Schmidt, J., held that:

injured semi-truck driver's statement describing the scope of his injuries in a worker's compensation proceeding was an evidentiary, rather than judicial, admission, but

injured driver's tort claim was barred under doctrine of collateral estoppel to extent it sought compensation for injuries beyond injury to his right knee identified in workers' compensation agreement.

Affirmed.

Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois. Circuit No. 16-L-21, Honorable Lance R. Peterson, Judge, Presiding.

**Attorneys and Law Firms**

Michael W. Rathsack and Adam J. Zayed, both of Chicago, for appellant.

Robert M. Burke and Garrett L. Boehm Jr., of Johnson & Bell, Ltd., of Chicago, for appellees.

**OPINION**

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.

***1** ¶ 1 Plaintiff, Clifton Armstead, appeals the circuit court's grant of partial summary judgment in favor of defendants, National Freight, Inc., d/b/a NFI Industries, Inc. (National Freight), and Derrick Roberts. Plaintiff argues the circuit court improperly characterized his statement from a separate but related action as a judicial admission. Originally, we reversed the judgment of the circuit court. After our initial disposition, defendants filed a petition for rehearing. Upon rehearing, we now affirm.

¶ 2 I. BACKGROUND

¶ 3 The record on appeal indicates that on March 6, 2015, defendant Roberts, while driving defendant National Freight's semi-truck, struck plaintiff's semi-truck in Grundy County. Plaintiff filed a tort complaint against defendants, alleging Roberts negligently operated the vehicle at an excessive speed in the course of his employment as National Freight's agent. Plaintiff complained of and sought damages for back, shoulder, and knee injuries that occurred as a result of the accident. He maintained the accident caused injuries to his back, shoulder, and knee in interrogatories.

¶ 4 At the time of the accident, plaintiff drove the semi-truck for his employer, Manfredi Mushroom Company (Manfredi), a Pennsylvania corporation. On or around March 31, 2015, plaintiff filed a workers' compensation claim against Manfredi in Pennsylvania for the injuries he sustained in the course of his employment. Plaintiff was represented by counsel. During the workers' compensation proceedings, an independent medical examiner opined that plaintiff suffered an injury to the right knee as a result of the March 6, 2015, accident. The independent medical examiner also opined: "[r]elative to [plaintiff's] lower back condition, the information available to me today does not indicate within a reasonable degree of medical certainty any injury to have been sustained by [plaintiff] relative to the lower back on or around March 6, 2015."

¶ 5 On November 9, 2016, plaintiff signed a "Compromise and Release Agreement by Stipulation" (Agreement) settling the Pennsylvania workers' compensation claim. The Agreement contained language pertinent to this appeal. Under the "Conclusions of Law" section, the signed Agreement states it is "appropriately approved as binding only on the signing Parties, and limited to their respective rights and obligations under the [Pennsylvania Workers' Compensation Act]." The Agreement also states it "is not to alter rights or obligations of any third party not a signatory to the Agreement." In the body of the Agreement, under "[s]tate the precise nature of the injury," the description indicates "[r]ight knee strain. The parties agree that Claimant did not sustain any other injury or medical condition as a result of his 3/06/2015 work injury." Plaintiff certified the complete Agreement by signature.

¶ 6 Defendants moved for partial summary judgment on plaintiff's tort claim, arguing the claim was barred under the doctrines of (1) collateral estoppel, (2) *res judicata*, and (3) judicial admission. Under their judicial admission argument, defendants maintained plaintiff could not present evidence of injuries other than to his knee based on the signed Agreement. The circuit court granted defendants' motion, finding the above statement concerning the scope of plaintiff's injuries to be a judicial admission disclaiming other injuries. The circuit court's partial grant of summary judgment limited plaintiff's tort claim injuries to knee issues. The circuit court, however, rejected summary judgment on the basis of collateral estoppel. Plaintiff moved for reconsideration, which the circuit court denied. Plaintiff dismissed the underlying complaint as a result.

***2** ¶ 7 On January 17, 2019, this court issued a Rule 23 order (see Illinois Supreme Court Rule 23 (eff. Apr. 1, 2018)) reversing the circuit court's grant of summary judgment in favor of defendants. Plaintiff moved to publish the order as an opinion. On February 5, 2019, we granted plaintiff's motion and published the opinion the same day. Two days later, defendants filed a

  

petition for rehearing, which we granted. Plaintiff filed a response; defendants filed a reply. We now consider defendants' arguments anew.

¶ 8 II. ANALYSIS

¶ 9 In the initial briefing, defendants urged this court to reject several of plaintiff's arguments for failure to raise them in the response to defendants' motion for summary judgment. When reading plaintiff's response, we observed all the arguments included on appeal. Defendants initially moved for summary judgment on three bases: (1) collateral estoppel, (2) *res judicata*, and (3) judicial admission. Plaintiff addressed the same issues in his response to defendants' motion as on appeal but not exclusively under the heading "Judicial Admission." Plaintiff's arguments are therefore properly before this court. See *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 978, 230 Ill.Dec. 317, 693 N.E.2d 446 (1998) (explaining it is longstanding law to require a legal theory be raised in an initial response).

¶ 10 Plaintiff argues the circuit court erred in granting defendants' motion for summary judgment because the response to "[s]tate the precise nature of your injuries" is not a judicial admission. Plaintiff points out language in the Agreement limiting its application as to plaintiff and his former employer. Additionally, plaintiff submits that the statement was not made under oath. Plaintiff points out that the statement is contradicted by his answers to interrogatories in this matter. While the statement may properly be considered an evidentiary admission, plaintiff contends the circuit court erred in finding it was a judicial admission.

¶ 11 A. Initial Disposition

¶ 12 In our initial disposition, we agreed with plaintiff that his statement in the Agreement did not constitute a judicial admission. Therefore, we found that the circuit court erred when it granted summary judgment on this issue. We adhere to this determination on rehearing.

¶ 13 Section 2-1005(c) of the Code of Civil Procedure provides for summary judgment when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). We review the record in the light most favorable to the nonmoving party. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280, 309 Ill.Dec. 361, 864 N.E.2d 227 (2007). We review a grant of summary judgment *de novo*. *Id.*

¶ 14 There are two types of admissions: judicial and evidentiary. Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86, 341 Ill.Dec. 121, 929 N.E.2d 1200 (2010). For a statement to constitute a judicial admission, it must be clear, unequivocal, and uniquely within the party's personal knowledge. *Serrano v. Rotman*, 406 Ill. App. 3d 900, 907, 348 Ill.Dec. 269, 943 N.E.2d 1179 (2011). The statement must also be an intentional statement that relates to concrete facts and not an inference or unclear summary. *Id.* Judicial admissions "do not include admissions made during the course of other court proceedings." *Green v. Jackson*, 289 Ill. App. 3d 1001, 1008, 224 Ill.Dec. 848, 682 N.E.2d 409 (1997). "Rather, such statements constitute evidentiary admissions." *Id.*

***3** ¶ 15 Evidentiary admissions may be explained by the party. *Brummet v. Farel*, 217 Ill. App. 3d 264, 267, 160 Ill.Dec. 278, 576 N.E.2d 1232 (1991). "Evidentiary admissions may be made in, among other things, pleadings in a case other than the one being tried ***." *Id.* Whether plaintiff's signed response in the Agreement is a judicial admission is a question of law we review *de novo*. *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480, 108 Ill.Dec. 140, 508 N.E.2d 301 (1987).

¶ 16 Each case defendants cite on the issue of judicial admissions is distinguishable. In *Hansen*, the plaintiff, during a deposition, said he fell as a result of rubber bumpers on the edge of a loading dock. *Id.* at 477-78, 108 Ill.Dec. 140, 508 N.E.2d 301. He

later attempted to change his answer to cite a different cause for his fall. *Id.* at 478, 108 Ill.Dec. 140, 508 N.E.2d 301. The court properly treated his deposition testimony as a judicial admission because the plaintiff made the statement in the course of the same proceeding. *Id.* at 482, 108 Ill.Dec. 140, 508 N.E.2d 301. Here, plaintiff signed the statement describing the scope of his injuries in a different proceeding.

¶ 17 In *Miller v. Miller*, 167 Ill. App. 3d 176, 118 Ill.Dec. 161, 521 N.E.2d 229 (1988), the plaintiff filed a claim against the defendants under the Illinois Workers' Compensation Act (Ill. Rev. Stat. 1985, ch. 48, ¶ 138.1 *et seq.*). He entered into a lump sum agreement disposing of all claims against the defendants. *Miller*, 167 Ill. App. 3d at 180, 118 Ill.Dec. 161, 521 N.E.2d 229. The plaintiff then brought a common law negligence claim against the same defendants. *Id.* at 177, 118 Ill.Dec. 161, 521 N.E.2d 229. The reviewing court affirmed the trial court's grant of summary judgment in favor of the defendants. *Id.* at 181, 118 Ill.Dec. 161, 521 N.E.2d 229. The court found the Illinois legislature intended the pursuit of recovery under the Workers' Compensation Act as a replacement to recovery in a common lawsuit. *Id.* It also observed that the plaintiff already fully recovered against the same defendants. *Id.* at 180, 118 Ill.Dec. 161, 521 N.E.2d 229. Here, the Agreement contains specific language indicating it is not the exclusive remedy for plaintiff; it does not alter his right to recovery against third parties. Additionally, plaintiff is seeking recovery against the alleged tortfeasor and his employer from whom he has not yet recovered.

¶ 18 Defendants' last case, *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, 354 Ill.Dec. 768, 958 N.E.2d 700, did not deal with judicial admissions but, rather, issues of collateral estoppel and *res judicata*.

¶ 19 In sum, because plaintiff made a contradictory statement about the extent of his injuries in a separate proceeding, the statement is properly characterized as an evidentiary admission. Accordingly, the circuit court erred when it partially granted defendants' motion for summary judgment on this basis. In our original disposition, we reversed on this basis. However, defendants have filed a petition for rehearing. Upon rehearing, we now affirm the circuit court's grant of partial summary judgment on an alternative basis.

¶ 20 B. Rehearing

¶ 21 On rehearing, defendants contend that this court overlooked their alternative argument that summary judgment should be affirmed because plaintiff's claims are barred under the doctrine of collateral estoppel. We now address this argument. Specifically, defendants argue that plaintiff should be estopped from seeking damages for injuries that are beyond those identified in the Pennsylvania workers' compensation Agreement. The circuit court rejected this argument. However, for the reasons that follow, we find plaintiff's claim is barred under the doctrine of collateral estoppel.

***4** ¶ 22 We review *de novo* the trial court's determination that the doctrine of collateral estoppel does not apply to the plaintiff's claims. *State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 158, 346 Ill.Dec. 518, 940 N.E.2d 1122 (2010) (citing *In re A.W.*, 231 Ill. 2d 92, 99, 324 Ill.Dec. 530, 896 N.E.2d 316 (2008)). Our function in undertaking such review is to determine whether the circuit court reached the proper result. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305, 297 Ill.Dec. 319, 837 N.E.2d 99 (2005). We need not defer to the reasons given by the court for its decision or the findings on which its decision is based. *Id.* Rather, we may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that basis. *Id.*

¶ 23 Collateral estoppel is an equitable doctrine. Application of the doctrine precludes a party from relitigating an issue decided in a prior proceeding. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 294, 212 Ill.Dec. 581, 657 N.E.2d 926 (1995). The minimum threshold requirements for the application of collateral estoppel are (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Illinois State Chamber of Commerce v. Pollution Control Board*, 78 Ill. 2d 1, 7, 34 Ill.Dec. 334, 398 N.E.2d 9 (1979).

  

¶ 24 There is no dispute that the first element of collateral estoppel is met. The issue in the Pennsylvania workers' compensation settlement is identical to the issue in the present case. The workers' compensation suit resolved the issue of the extent of plaintiff's injuries following the March 6, 2015, motor vehicle accident. Plaintiff's present suit is for damages resulting from the same March 6, 2015, accident.

¶ 25 The second element of collateral estoppel, *i.e.*, a final judgment on the merits in the previous adjudication, is also satisfied. The Agreement entered in the workers' compensation proceedings set the parties' rights and liabilities based upon the agreed facts stated in the Agreement. Thus, it qualified as a judgment on the merits. This is true even though the Agreement came from a settlement between the parties rather than an independent determination of the facts and issues. In Illinois, a settlement award entered by the Workers' Compensation Commission is a final adjudication of all matters in dispute up to the time of the agreement. *Richter*, 2011 IL App (2d) 100114, ¶ 18, 354 Ill.Dec. 768, 958 N.E.2d 700 (citing *Stromberg Motor Device Co. v. Industrial Comm'n*, 305 Ill. 619, 622, 137 N.E. 462 (1922)).[1] Consequently, the Agreement entered in the Pennsylvania workers' compensation proceedings acted as a final adjudication as to the extent of plaintiff's injuries.

1 The same is true under Pennsylvania law. See *Holts v. Thyssenkrupp Elevator Corp.*, No. 3117, 2009 WL 8404585 (Pa. Ct. C.P. Aug. 4, 2011) (trial order); *Frederick v. Action Tire Co.*, 744 A.2d 762, 766 (Pa. Super. Ct. 1999) (citing *Kohler v. McCrory Stores*, 532 Pa. 130, 615 A.2d 27 (1992)); *Christopher v. Council of Plymouth Township*, 160 Pa.Cmwlth. 670, 635 A.2d 749, 752-53 (1993).

¶ 26 Despite this, plaintiff claims that the language of the Agreement precludes a finding that the Agreement acted as a final adjudication on the merits. The Agreement provided: "[t]his Decision is entered into *without adoption or litigated determination on the merits of the matters agreed upon*, and is not to alter the rights or obligations of any third party not a signatory to this Agreement." Since the Agreement specifically stated that nothing was "litigated," plaintiff contends that no final judgment occurred in the workers' compensation proceedings.

***5** ¶ 27 We disagree. One flaw in plaintiff's argument is that it conflates the terms "litigation" and "prior adjudication." For collateral estoppel to apply, a prior adjudication is required. Litigation is not. Instead, only the incentive and opportunity to litigate is required. This is true so that a failure to litigate the issue is, in fact, a concession of that issue. See *Talarico v. Dunlap*, 177 Ill. 2d 185, 192, 226 Ill.Dec. 222, 685 N.E.2d 325 (1997).

¶ 28 Plaintiff had both the incentive and opportunity to litigate the full extent of his injuries in the Pennsylvania workers' compensation proceedings. Those proceedings lasted more than a year. During which, an independent medical examiner opined that plaintiff suffered an injury to the right knee as a result of the March 6, 2015, accident. The independent medical examiner also opined: "[r]elative to [plaintiff's] lower back condition, the information available to me today does not indicate within a reasonable degree of medical certainty any injury to have been sustained by [plaintiff] relative to the lower back on or around March 6, 2015." It makes sense then that plaintiff ultimately narrowed his workers' compensation claim. To that end, he entered into the Agreement in which he certified that the only injury he sustained in the accident occurred to his right knee. His failure to proceed with any additional injury claims acted as a concession of those issues.

¶ 29 Moreover, plaintiff did indeed have an incentive to litigate the entire extent of his injuries during the workers' compensation proceedings. We are not persuaded by plaintiff's argument that he agreed to settle his workers' compensation claim—limiting the extent of the injuries—simply because he was out of work and needed money. It is true that "[i]ncentive to litigate might be absent *** where the amount at stake in the first litigation was insignificant, or if the future litigation was not foreseeable." *Id.* However, that is not the case here. Plaintiff had every incentive to maximize the compensation he could obtain in the workers' compensation proceedings. It is curious that he claims he did not have the incentive to litigate the full extent of his injuries when he did, in fact, attempt to obtain compensation for his alleged back injury. Perhaps he lacked the incentive to pursue this because it was clear from the independent medical examiner's opinion that plaintiff would not successfully obtain compensation for the claimed injury. He also concedes that he accepted the Agreement under the belief that he would be filing a civil suit against defendants. In short, plaintiff's argument that he had no incentive to pursue compensation for his back injuries is meritless.

  

¶ 30 Further, we reject plaintiff's contention that the workers' compensation settlement language prevents defendants from using the award as a bar to plaintiff's recovery in this civil action. As stated above (*supra* ¶ 25), a workers' compensation settlement is an adjudication on the merits. Even if one could contract around this law, the Agreement itself states that it does not "alter the rights or obligations of *any third party* not a signatory to this Agreement." The plain language of the settlement agreement does not alter defendants' rights. In other words, it does not alter defendants' right to raise the prior adjudication to bar plaintiff from relitigating the issue in this case.

***6** ¶ 31 Finally, we find that the third element of collateral estoppel is satisfied. The third element requires an identity of parties. Plaintiff in this action is the same party to the workers' compensation case. See *Todd v. Katz*, 187 Ill. App. 3d 670, 674, 135 Ill.Dec. 498, 543 N.E.2d 1066 (1989) (only the party against whom estoppel is asserted must be the same or in privity with the party in the prior adjudication). Consequently, we find all three requirements of collateral estoppel are met. Therefore, we hold that plaintiff is estopped from seeking compensation for any injury beyond that contained in the Agreement.

¶ 32 In reaching this conclusion, we reject plaintiff's contention that even if the threshold requirements for collateral estoppel are present here, it would be unfair to apply the doctrine under the present circumstances.

> "A court's determination not to apply collateral estoppel because of unfairness typically rests either on some inadequacy in the forum in which the matter was first determined (*Herzog v. Lexington Township*, 167 Ill. 2d 288, 296, 212 Ill.Dec. 581, 657 N.E.2d 926 (1995)), or on the view that the party to be estopped did not previously have a full and fair opportunity to litigate the issue, perhaps because the party had no motivation to vigorously litigate the issue in the earlier case (*Talarico*, 177 Ill. 2d at 192, 226 Ill.Dec. 222, 685 N.E.2d 325)." *Richter*, 2011 IL App (2d) 100114, ¶ 25, 354 Ill.Dec. 768, 958 N.E.2d 700.

¶ 33 Here, neither factor is present. First, plaintiff makes no argument that the Pennsylvania workers' compensation forum varied in any meaningful way from the same type of proceedings in Illinois. In Illinois, the procedural adequacy of workers' compensation proceedings has long been recognized by Illinois courts. See *id.* ¶ 26 (citing *Stromberg*, 305 Ill. at 622, 137 N.E. 462). Second, as we have already found (*supra* ¶¶ 28-29), plaintiff had the full and fair opportunity to litigate the extent of his injuries in Pennsylvania. We find no unfairness in barring plaintiff from now complaining of additional injuries when he had the opportunity to pursue those claims during the workers' compensation proceedings.

¶ 34 In sum, we find all three elements of collateral estoppel are satisfied. Therefore, we hold that the circuit court correctly granted defendants' motion for partial summary judgment, albeit, on different grounds.[2]

2 Having resolved this appeal on the basis of collateral estoppel, we need not reach defendants' second alternative argument based on judicial estoppel.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the Grundy County circuit court's grant of summary judgment.

¶ 37 Affirmed.

Justices Carter and Wright concurred in the judgment and opinion.

**All Citations**

--- N.E.3d ----, 2020 IL App (3d) 170777, 2020 WL 6817687

**End of Document**

**Circulation Date:** 11/10/2016

**DECISION RENDERED COVER LETTER**

**WCAIS Claim Number:** 7518983
**Dispute Number:** DSP-7518983-3

**Insurer Claim Number:** 555172513
**Injury Date:** 03/06/2015
**Judge:** Joseph Hakun

**Petitions:**

Petition To/For (LIBC-378) Review Compensation Benefits (Ask Judge to Review Agreement/Notice for mistakes)
Petition To/For (LIBC-378) Penalties (For violation of the Act, Rules and Regulations)
Petition To/For (LIBC-378) Terminate Compensation Benefits (Stop payment of Workers' Compensation)

CLIFTON ARMSTEAD
7 CHESWOLD BLVD APT 1A
NEWARK, DE 19713

ROGER C McMENAMIN, ESQ.
261 OLD YORK RD STE 200
JENKINTOWN, PA 19046-3724

vs

MANFREDI MUSHROOM CO INC
PO Box 368
Kennett Square, PA 19348-0368

Martin N Chitjian, ESQ.
970 Rittenhouse Rd Ste 300
Norristown, PA 19403-2265

GRANITE STATE INSURANCE COMPANY
625 Liberty Ave
Pittsburgh, PA 15222-3110

AIG Claims, Inc.
625 Liberty Ave
Ste 1100
Pittsburgh, PA 15222-3148

The attached Decision of the Judge is final unless an appeal is taken to the Workers' Compensation Appeal Board as provided by law.

If you do not agree with this Decision, an appeal must be filed with the Workers' Compensation Appeal Board within 20 days from, but not including, the date of this notice.

An appeal may be filed online, at Http://www.dli.state.pa.us/wcais, or paper forms for an appeal may be obtained from:

Workers' Compensation Appeal Board
901 North Seventh Street
Third Floor South
Harrisburg, PA 17102
(717) 783-7838

| Claimant/Employee Exhibits | | | |
|---|---|---|---|
| **Number** | **Name** | **Admitted** | **Submitted For** |

| Defendant/Employer Exhibits | | | |
|---|---|---|---|
| **Number** | **Name** | **Admitted** | **Submitted For** |

| Insurer Exhibits | | | |
|---|---|---|---|
| **Number** | **Name** | **Admitted** | **Submitted For** |

| TPA Exhibits | | | |
|---|---|---|---|
| **Number** | **Name** | **Admitted** | **Submitted For** |

| Judge Exhibits | | | |
|---|---|---|---|
| **Number** | **Name** | **Admitted** | **Submitted For** |
| J1 | Compromise and Release Agreement | Yes | Hakun, Joseph |
| J2 | Fee Agreement and Child Support Documents | Yes | Hakun, Joseph |

| Witnesses | | |
|---|---|---|
| **Name** | **Witness For** | **Hearing Date** |
| Clifton Armstead | Claimant/Employee | 11/09/2016 |

| Events | | | |
|---|---|---|---|
| **Date** | **Time** | **Location** | **Status** |
| 03/15/2017 | 10:00:00 | Malvern Field Office | Canceled |
| 11/09/2016 | 09:00:00 | Malvern Field Office | Conducted |
| 10/19/2016 | 09:00:00 | Malvern Field Office | Conducted |
| 09/19/2016 | 10:00:00 | Malvern Field Office | Conducted |
| 03/09/2016 | 09:00:00 | Malvern Field Office | Conducted |
| 02/24/2016 | 09:30:00 | Malvern Field Office | Conducted |

**Clifton Armstead**
**Penalty, Review and Termination Petitions**
**DSP-7518983-3**
**Page 1**
**HEARING DATE: November 9, 2016** **CLAIMANT TESTIFIED**

**ADJUDICATION UNDER SECTION 449**
**(Approval of Compromise & Release Agreement)**

**FINDINGS OF FACT**

1. The instant Compromise and Release Agreement ("Agreement") was submitted for approval at an open hearing on the above date. As the Agreement may have been amplified and/or modified at hearing, such matters as noted of record are by reference incorporated into the Agreement for all purposes.

2. The Agreement was explained to the Claimant as it relates to the provisions of the Pennsylvania Workers' Compensation Act ("Act"), and under oath the Claimant acknowledged an understanding of its terms and of its legal significance as related to the Act.

3. Documentation under Act 109 of 2006 relating to Child Support Orders has been submitted, which if necessary, is addressed in the Order below.

4. The undersigned finds the Claimant understands the full legal significance of the Agreement as it relates to the provisions of the Act.

**CONCLUSIONS OF LAW**

The Parties have complied with Section 449 of the Act, and the Agreement as referenced of record is appropriately approved as binding only on the signing Parties, and limited to their respective rights and obligations under the Act. This Decision is entered without adoption or litigated determination on the merits of the matters agreed upon, and is not to alter rights or obligations of any third party not a signatory to the Agreement, including any health insurance company or governmental agency. Any separate agreement or understanding beyond the instant C&R Agreement, not specifically addressed and approved at the hearing, which in whole or in part is dependent on the consideration being paid for the C&R Agreement, or otherwise required to be agreed to as a condition for the C&R Agreement, is not approved and is deemed invalid.

CLIFTON ARMSTEAD vs MANFREDI MUSHROOM CO INC
DSP-7518983-3

## ORDER

NOW, November 9, 2016, pursuant to the Findings of Fact and within the purview of the Conclusions of Law, the instant Agreement is APPROVED as it may have been amplified and/or modified at hearing, including Attorney Fees if applicable, and the Parties are to implement their understanding in accordance with the terms and conditions as referenced of record at the above hearing FORTHWITH.

Nothing in this Decision is to be deemed to signify compliance with federal law, and the Parties, their Attorneys and Representatives, are directed to comply with federal law relating to workers' compensation settlements, including without limitation, Medicare Medical Set-Aside Arrangements, as may be applicable. All outstanding proceedings are disposed of by this Decision.

Joseph Hakun
Workers' Compensation Judge
Malvern Field Office

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
WORKERS' COMPENSATION OFFICE OF ADJUDICATION

# COMPROMISE AND RELEASE AGREEMENT BY STIPULATION PURSUANT TO SECTION 449 OF THE WORKERS' COMPENSATION ACT

EMPLOYEE SOCIAL SECURITY NUMBER OR WC ID NUMBER: W10133955 9

DATE OF INJURY (MM-DD-YYYY): 03-06-2015

WCAIS CLAIM NUMBER: 751898 3

**EMPLOYEE**

First name: Clifton
Last name: Armstead
Date of birth:
Address: 7 Cheswold Blvd. Apt. 1A
Address:
City/Town: Newark State: DE ZIP: 19713
County:
Telephone:

**NOTICE: SUBMIT TO THE ASSIGNED WORKERS' COMPENSATION JUDGE.**

**TO THE EXTENT THIS AGREEMENT REFERENCES AN INJURY FOR WHICH LIABILITY HAS NOT BEEN RECOGNIZED BY AGREEMENT OR BY ADJUDICATION, THE TERM "INJURY" AS USED IN THIS AGREEMENT SHALL MEAN "ALLEGED INJURY."**

**"FUND" SHALL MEAN THE UNINSURED EMPLOYERS GUARANTY FUND (UEGF), SELF-INSURANCE FUND (SIF), SELF-INSURANCE GUARANTY FUND (SIGF) OR THE PREFUND ACCOUNT OF THE SELF-INSURANCE GUARANTY FUND.**

**EMPLOYER**

Name: Manfredi Mushroon Co. Inc.
Address: PO Box 368
Address:
City/Town: Kennett Square State: PA ZIP: 19348
County:
Telephone: FEIN:

**INSURER, FUND or THIRD PARTY ADMINISTRATOR** (if self-insured)

Name: Grantite State Insurance Company c/o AIG Claims, Inc.
Address: PO Box 305903
Address:
City/Town: Nashville State: TN ZIP: 37230-5903
County:
Telephone: FEIN:
NAIC code: or Insurer code:
Insurer/TPA claim #: 555-172513

**This is an agreement in the case of the above listed employee and the above listed employer, insurer. Fund or third party administrator in regards to an injury or occupational disease.**

1. State the **date of injury** or occupational disease. 03-06-2015 (MM-DD-YYYY)

2. State the **average weekly wage** of the employee, as calculated under Section 309. $ 1,210.20 /wk

3. State the **weekly compensation rate** paid or payable. $ 806.80 /wk

4. State the precise **nature of the injury** and whether the disability is total or partial.

   Right knee strain. The parties agree that Claimant did not sustain any other injury or medical condition as a result of his 03/06/2015 work injury.

5. State the amount of benefits paid or due and unpaid to the employee or dependent up to the data of this agreement or death. **Wage Loss:** $ 0.00 **Specific Loss:** $ 0.00 **Medical:** $ 0

6. Is this Compromise and Release Agreement a resolution of **wage loss benefits** for the injury referenced in paragraphs 1 and 4?
☒ Yes ☐ No

7. Is this Compromise and Release Agreement a resolution of **medical benefits** for the injury referenced in paragraphs 1 and 4?
☒ Yes ☐ No

8. Is this Compromise and Release Agreement a resolution of **specific loss benefits** for the injury referenced in paragraphs 1 and 4?
☒ Yes ☐ No

9. Does this claim arise out of the death of an employee? ☐ Yes ☐ No
If **yes**, complete and attach a **Death Claim Supplement.**

10. Summarize all **wage loss, specific loss** and **medical benefits** to be paid in conjunction with this Compromise and Release Agreement:

Upon approval of this Agreement, the Employer/Carrier shall pay the following to Claimant, Clifton Armstead;

Lump Sum Payment at Settlement;

i) Cash at settlement, to Clifton Armstead, in the sum of $80,000.00. Out of this lump sum, Claimant's attorney, Roger McMenamin shall receive $16,000 for his attorney fees.

Periodic Payments

I) Period Certain periodic payments made payable to Clifton Armstead: Beginning March 1, 2017 the sum of $251.16 monthly for 60 payments guaranteed through February 1, 2022.

ii) Guaranteed Lump Sum made payable to Clifton Armstead: $10,053.19 payable on 02-01-2027.

iii) Period Certain periodic payments made payable to Roger McMenamin: Beginning March 1, 2017 the sum of $62.78 monthly for 60 payments guaranteed through February 1, 2022. (As attorney fee)

iv) Guaranteed Lump Sum made payable to Roger McMenamin: $2,513.29 payable on 02-01-2027. (As attorney fee)

(see addendum to paragraph 10 attached hereto and incorporated herein as though set forth at length)

The total cost of this settlement is $110,000.00

Employer/Carrier shall pay all bills for medical treatment that is reasonable, necessary and related to Claimant's work related right knee injury (as identified in paragraph 4 of this Agreement) and which was rendered to Claimant from 03/06/2015 to the 11/09/2016 Compromise & Release hearing. All bills shall be paid pursuant to the cost containment provisions of the Act. The Employer does not waive any rights under the Act and all bills must be submitted pursuant to the Act to be payable. Employer/Carrier shall only be responsible for payment of treatment related to Claimant's work related right knee sprain. All liability extinguishes as of the 11/09/2016 Compromise & Release hearing pursuant to Section 449 of the Act.

Payment of the sums outlined above represents a full Compromise and Release of Claimant's 03/06/2015 work injury. This Agreement fully resolves all issues relating to Claimant's 03/06/2015 work injury including, but not limited to indemnity, specific loss, medical benefits, penalties and interest. Claimant agrees that this Agreement fully resolves any and all pending petitions, appeals, or remands involving Claimant's 03/06/2015 work injury.

11. Is there an actual or potential lien for subrogation under Section 319? ☒ Yes ☐ No
If **yes**, state (if known) the total amount of compensation, including medicals, paid or payable, which would be allowed to the employer or insurer.

Employer/Carrier preserves its rights to suborgation in full and in no way is waiving any portion of any lien or potential lien.

12. Are there any current child or spousal support orders in place against the employee? ☐ Yes ☒ No

**Verification pursuant to Special Rules of Administrative Practice and Procedure before Workers' Compensation Judges, Rule 131.111(c), must be attached.**

If yes, provide details:

13. List all benefits received by, or available to the employee; e.g. Social Security (disability or retirement) private health insurance, Medicare, Medicaid, etc.

Claimant does not receive Social Security Disability benefits and is not a Medicare beneficiary.

The sum of $110,000.00 represents payment of all future workers' compensation wage indemnity claims as compensation for impairment of Claimant's remaining lifetime earning power. Out of this sum, Claimant is paying $22,000.00 for attorney's fees. Claimant will net $88,000.00. Claimant's remaining life expectancy (according to Arias E.; United States Life Tables, 2010; National Vital Statistics Reports; vol. 63, no. 7; Hyattsville, Maryland: National Center for Health Statistics, November 6, 2014) is 30.5 years or 366 months. Although the above amount is to be paid in a lump sum, for the purpose of determining the set-off by the Social Security Administration, Claimant's remaining workers' compensation benefits are considered payable at the rate of $240.43 per month for 366 months, commencing the day before the date of the Decision granting the Compromise and Release. The commencement date represents the last payment of temporary total disability benefits. See Program Operations Manual System (POMS) Section DI - 52001.555(C)(4); Sanfilippo v. Barnhart, 325 F.3d 391 (3d.Cir.2003); Sciarotta v. Bowen, 837 F.2d 135 (3d. Cir. 1988).

14. This Compromise and Release Agreement addresses the interests of **Medicare** in accordance with the Medicare Secondary Payer Statue (42 U.S.C. Section 1395(y)):

(a) Manner in which Medicare's interests have been addressed:

It is not the purpose of this settlement agreement to shift responsibility of medical care in this matter to the Medicare program. Instead, this settlement is intended to resolve a dispute between the Claimant and Employer/Carrier.

This claim does not meet Medicare's current review thresholds as described in the July 11, 2005 and April 24, 2006 Medicare Policy Memoranda. As such, this claim does not require review and/or approval from CMS. If the claim had met the review thresholds, a submission would have been made for a $5,000.00 allocation for future care based on ((a) the disputed nature of the claim, or (b) the lack of anticipated medical care).

The Claimant in this case has not applied for Social Security Disability Insurance ("SSDI") and is not classified by Medicare as having a "reasonable expectation of Medicare enrollment within 30 months." As such, this claim does not meet Medicare's current review thresholds as described in the July 11, 2005 and April 24, 2006 Medicare Policy Memoranda. The claimant has not applied, and has no plans to apply for SSDI. It is not anticipated or foreseeable that the claimant will become eligible for Medicare in the near future. Therefore, no funds are being set aside for the claimant's future Medicare-covered treatment.

(b) Amount allocated: $ 5,000.00

(c) Manner is which **conditional payments** have been addressed:

✓ Because the Claimant is not a Medicare recipient, it is believed by the parties that no conditional payments have been made by Medicare. If any conditional payments have been made, the Claimant has been advised and fully understands that reimbursement for such conditional payments are the responsibility of the Claimant and must be satisfied out of these settlement proceeds.

15. Check as appriopriate:

☐ A vocational evaluation of the employee was completed in conjunction with this Compromise and Release Agreement on

____ - ____ - _____ by _____

**A copy of this report must be attached.**

-OR-

☒ A vocational evaluation of the employee has been waived by mutual agreement of the parties.

16. State the **issues** involved in this claim and the reasons why the parties are entering into this agreement. Whether the Claimant understands the legal significance of entering into this Agreement.

17. **A copy of the fee agreement between employee and counsel must be attached.**
State the amount of the fee: $ 22,279.80

18. **Litigation costs** in the total amount of $ 1,479.88 shall be the responsibility of employer/carrier

19. State **additional terms and provisions,** if any:

Payment of the sums outlined above represents a full Compromise and Release of Claimant's 03/06/2015 work injury. This Agreement fully resolves all issues relating to Claimant's 03/06/2015 work injury including, but not limited to indemnity, specific loss, medical benefits, penalties and interest. Claimant agrees that this Agreement fully resolves any and all pending petitions, appeals, or remands involving Claimant's 03/06/2015 work injury.

Claimant's entitlement to indemnity and medical benefits stop as of the 11/09/2016 Compromise & Release hearing. If any payments are made after that date, Employer/Carrier is entitled to a credit for such payments to be taken from Claimant's lump sum portion of the settlement proceeds.

The Claimant agrees to waive the 20 day Appeal period.

**REMINDER TO PARTIES: Upon approval of the agreement, please promptly withdraw all appeals pending before the Workers' Compensation Appeal Board, Commonwealth Court, Pennsylvania Supreme Court, etc., which are also resolved by this agreement.**

## EMPLOYEE'S CERTIFICATION

1. I certify that I have read this entire agreement, or to the best of my knowledge, information and belief (if applicable) this agreement has been read to me, and I understand all the contents of this agreement as well as the full legal significance and consequences of entering into this agreement.

2. I understand that, if this agreement is approved, I will receive only the benefits mentioned in this agreement, unless the agreement provides specifically for additional amounts. I understand that my employer, its insurance company or its administrator will never have to pay any other workers' compensation benefits for the injury.

3. Except for the amounts of benefits listed in this agreement, I have been offered nothing of value to convince me to sign this agreement.

4. I have been represented by an attorney of my own choosing during this case. My attorney has explained to me the content of this agreement and its effects upon by rights. CEA (Employee's Initials)

   -OR-

   I have not been represented by an attorney of my own choosing. However, I have been told that I have the right to be represented by an attorney of my own choosing in this proceeding. I have made my own decision not to have an attorney represent me. _____ (Employee's Initials)

5. Unless specifically stated in this agreement, I understand that this agreement is a compromise and release of a workers' compensation claim, and is not considered an admission of liability by employer and/or insurer and/or administrator and/or fund.

**DO NOT SIGN THIS DOCUMENT UNLESS YOU UNDERSTAND THE FULL LEGAL SIGNIFICANCE OF THIS AGREEMENT**

All parties have read this agreement and agree to its contents. We understand that under this agreement, **all petitions are resolved unless specifically agreed to herein.** A list of any petitions or issues that remain open after approval of the Compromise and Release Agreement must be provided in this agreement.

DATE 11 - 09 - 2016 (MM - DD - YYYY)

Employee's signature

Witness to employee's signature

Employee's counsel signature

Witness to employee's signature

Fund/Employer/Insurer/Third Party Administrator's signature

Fund/Employer/Insurer/Third Party Administrator counsel's signature

If not witnessed above, this agreement must be notarized as follows:

AFFIDAVIT/ACKNOWLEDGMENT:

Before me, the undersigned notary public, in and for the aforesaid county and state, personally appeared _____ who being first duly sworn, does depose and state that he/she knows (or has satisfactorily proven to be) the individual identified as the employee in the foregoing compromise and release agreement; and that he/she has executed the foregoing compromise and release agreement for the purposes stated herein:

Notary Public

**THE COMPROMISE AND RELEASE AGREEMENT IS NOT VALID AND BINDING UNLESS APPROVED BY A WORKERS' COMPENSATION JUDGE IN A DECISION.**

Any individual filing misleading or incomplete information knowingly and with the intent to defraud is in violation of Section 1102 of the Pennsylvania Workers' Compensation Act, 77 P.S. §1039.2, and may also be subject to criminal and civil penalties under 18 Pa. C.S.A. §4117 (relating to insurance fraud).

| Employer Information Services | Claims Information Services | Hearing Impaired | Email |
|---|---|---|---|
| 717.772.3702 | toll-free inside PA: 800.482.2383<br>local & outside PA: 717.772.4447 | toll-free inside PA TTY: 800.362.4228<br>local & outside PA TTY: 717.772.4991 | ra-li-bwc-helpline@pa.gov |

*Auxiliary aids and services are available upon request to individuals with disabilities.*
*Equal Opportunity Employer/Program*



LIBC-755 REV 09-13 (Page 4)





A-16

**ADDENDUM TO PARAGRAPH 10 OF THE COMPROMISE AND RELEASE FOR Clifton Armstead**

**TERMS AND CONDITIONS OF ANNUITY PAYMENTS**

**Payments**

In consideration of the Agreement, Granite State Insurance Co. ("Insurer") agrees to make the following payments due at the time of settlement:

i) Cash at settlement, cash in the sum of $80,000.00.

**Periodic Payments**

In consideration of the Agreement, Insurer agrees to make future Periodic Payments as follows (the "Periodic Payments"):

i) Period Certain periodic payments made payable to Clifton Armstead: Beginning March 1, 2017 the sum of $251.16 monthly for 60 payments guaranteed through February 1, 2022.
ii) Guaranteed Lump Sum made payable to Clifton Armstead: $10,053.19 payable on 02-01-2027.
iii) Period Certain periodic payments made payable to Roger McMenamin: Beginning March 1, 2017 the sum of $62.78 monthly for 60 payments guaranteed through February 1, 2022.
iv) Guaranteed Lump Sum made payable to Roger McMenamin: $2,513.29 payable on 02-01-2027.

Clifton Armstead authorizes and instructs payments as listed in iii) and iv) above to be made to his attorney as provided herein. Clifton Armstead acknowledges and agrees that these payment instructions are solely for Clifton Armstead's convenience and do not provide Clifton Armstead's attorney with any ownership interest in any portion of the annuity or the settlement other than the right to receive the payments in the future as more specifically set forth herein.

All sums set forth herein constitute damages on account of personal injuries and sickness in a case involving physical injury or physical sickness within the meaning of Section 104(a)(1) of the Internal Revenue Code of 1986, as amended.

**Right to Payments**

Payee acknowledges that the Periodic Payments cannot be accelerated, deferred, increased or decreased by any payee; nor shall any payee have the power to sell,

mortgage, encumber, or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

**Consent to Qualified Assignment**

Payee acknowledges and agrees that the Insurer may make a "qualified assignment", within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, of the Insurer's liability to make the Periodic Payments set forth above to American General Annuity Service Corporation (the "Assignee"). The Assignee's obligation for payment of the Periodic Payments shall be no greater than that of Insurer (whether by judgment or agreement) immediately preceding the assignment of the Periodic Payments obligation.

Any such assignment, if made, shall be accepted by the Payee without right of rejection and shall completely release and discharge the Insurer from the Periodic Payments obligation assigned to the Assignee. The Payee recognizes that, in the event of such an assignment, the Assignee shall be the sole obligor with respect to the Periodic Payments obligation, and that all other releases with respect to the Periodic Payments obligation that pertain to the liability of the Insurer shall thereupon become final, irrevocable and absolute.

**Right to Purchase an Annuity**

Insurer, itself or through its Assignee, reserves the right to fund the liability to make the Periodic Payments through the purchase of an annuity policy from American General Life Insurance Company. The Insurer or the Assignee shall be the sole owner of the annuity policy and shall have all rights of ownership. The Insurer or the Assignee may have American General Life Insurance Company mail payments directly to the Payee. The Payee shall be responsible for maintaining a current mailing address with American General Life Insurance Company.

**Beneficiary**

Any payments to be made after the death of the Payee in accordance with the terms of this Settlement Agreement shall be made to the beneficiary designated herein; or to such beneficiary as may be requested in writing by the Payee to the owner of the annuity. If no beneficiary is designated herein or requested by the Payee, the payments shall be made to the estate of the Payee. No request made under this section nor any revocation thereof shall be effective unless it is in writing and delivered to the owner of the annuity.

**Discharge of Obligation**

The obligation assumed by American General Life Insurance Company and/or its assignee with respect to any required payment shall be discharged upon the mailing on or before the due date of a valid check in the amount specified to the address of record for Payee, or by direct deposit or electronic funds transfer if so requested. However, if a check is lost or otherwise not received, the Annuity Issuer,

upon notification of said check being lost, or not received, shall promptly reissue said check, subject to verification of "stop payment" that Payee has not negotiated said check. Payee recognizes that Assignee shall be the sole obligor with respect to the obligations assigned, and that all other releases that pertain to the liability of Insurer shall thereupon become final, irrevocable and absolute.

No. 126730

**IN THE**
**SUPREME COURT OF ILLINOIS**

| | |
|---|---|
| CLIFTON ARMSTEAD, | ) |
| | ) |
| Plaintiff-Petitioner, | ) |
| | ) |
| | ) |
| vs. | ) |
| | ) |
| NATIONAL FREIGHT, INC., and DERRICK ROBERTS, | ) |
| | ) |
| | ) |
| Defendants-Respondents. | ) |

## AFFIDAVIT

The undersigned certifies that in December of 2020, he asked counsel in Pennsylvania to inquire of the Deputy Secretary of the Compensation & Insurance, PA Department of Labor & Industry, Mr. Scott Weiant, about the number of compromise and release agreements presented to agency judges for approval in workers' compensation cases in 2019. He was asked that to clarify the meaning of the information reported on the Office of Adjudication Statistical Review in the state's annual report identified in the Petition. Mr. Weiant reported by email that 22,961 such petitions were presented in 2019. Counsel has that email sent over Mr. Weiant's name.

s/ *Michael W. Rathsack*

**Certification**

Under penalties as provided by law pursuant to Section 5/1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ ***Michael W. Rathsack***

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 16 L 21

Armstead

vs.

National Freight, Inc et al

ORDER

This Cause coming to be heard on Defendants' Motion for Partial Summary Judgement and for status, due notice having been given, the Court having heard oral argument, and being fully advised in the premises,

It is hereby ordered:

1) For the reasons stated on the record, Defendants' Motion for Partial Summary Judgment / Summary Determination of a Major Issue is granted on the basis that the statement given by Plaintiff in the Worker's Compensation Settlement Agreement constitutes a judicial admission. The Court denies the res judicata / collateral estoppel argument as a basis to grant the motion;

2. The Court finds, pursuant to Illinois Supreme Court Rule 304(a), that there exists no just reason to delay enforcement or appeal of this order;

3. This matter is continued for status on August 29, 2017 at 9:00 am without further notice.

DATE June 14, 2017

JUDGE

A

C 525

(4)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 16L21

Armstead

vs.

National Freight

ORDER

Matter comes to be heard for Ruling on Plaintiffs motion to Reconsider, the Court being advised on premises, IT IS HEREBY ORDERED:

(1) For the reasons discussed by Honorable Judge Peterson in open Court, the Motion to Reconsider is denied.

(2) Pursuant to SCR 304(a) there is no reason to delay enforcement or appeal of this ruling

(3) matter is continued until 1/3/18 at 9:00 a.m. for status.

DATE 10/18/17

JUDGE

B

C 526

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

| | | |
|---|---|---|
| ARMSTEAD, CLIFTON | ) | |
| Plaintiff/Petitioner | ) | Appellate Court No: 3-17-0777 |
| | ) | Circuit Court No: 2016L21 |
| | ) | Trial Judge: Judge Lance R Peterson |
| v | ) | |
| | ) | |
| | ) | |
| NATIONAL FREIGHT, INC DBA NFI INDUS | ) | |
| Defendant/Respondent | ) | |

**COMMON LAW RECORD - TABLE OF CONTENTS**

Page 1 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

| | | |
|---|---|---|
| ARMSTEAD, CLIFTON | ) | |
| Plaintiff/Petitioner | ) | Appellate Court No: 3-17-0777 |
| | ) | Circuit Court No: 2016L21 |
| | ) | Trial Judge: Judge Lance R Peterson |
| v | ) | |
| | ) | |
| | ) | |
| NATIONAL FREIGHT, INC DBA NFI INDUS | ) | |
| Defendant/Respondent | ) | |

**COMMON LAW RECORD - TABLE OF CONTENTS**

126730

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

| | | |
|---|---|---|
| ARMSTEAD, CLIFTON | ) | |
| Plaintiff/Petitioner | ) | Appellate Court No: 3-17-0777 |
| | ) | Circuit Court No: 2016L21 |
| | ) | Trial Judge: Judge Lance R Peterson |
| v | ) | |
| | ) | |
| | ) | E-FILED<br>Transaction ID: 3-17-0777<br>File Date: 1/16/2018 3:42 PM<br>Barbara Trumbo, Clerk of the Court<br>APPELLATE COURT 3RD DISTRICT |
| NATIONAL FREIGHT, INC DBA NFI INDUS | ) | |
| Defendant/Respondent | ) | |

**REPORT OF PROCEEDINGS - TABLE OF CONTENTS**

Page 1 of 1

## NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

| | | |
|---|---|---|
| CLIFTON ARMSTEAD, *Plaintiff-Appellant,* | ) | |
| v. | ) | No. 126730 |
| NATIONAL FREIGHT, INC. d/b/a NFI INDUSTRIES, INC. and DERRICK ROBERTS, *Defendants-Appellees.* | ) | |

The undersigned, being first duly sworn, deposes and states that on May 12, 2021, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Appellant. On May 12, 2021, service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Garrett L. Boehm, Jr.
Robert M. Burke
Johnson & Bell
boehmg@jbltd.com
burker@jbltd.com

Kurt Niermann
Porro Niemann Law Group LLC
kurt@pnlawoffice.com

Michelle LaFayette
Ganan & Shapiro
mlafayette@gananlaw.com

Nicholas Nepustil
Benjamin and Shapiro Ltd.
nnepustil@benshaplaw.com

Vitas J. Mockatis
Costa & Ivone
vmockatis@costaivone.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

*/s/ Michael W. Rathsack*
Michael W. Rathsack

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

*/s/ Michael W. Rathsack*
Michael W. Rathsack