

23-5613 ORIGINAL

SUPREME COURT OF THE UNITED STATES

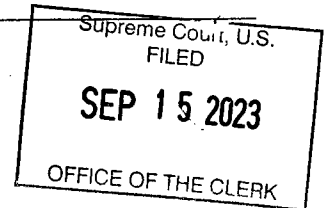
Robert L. Allum,

Petitioner,

vs.

MONTANA STATE FUND and
STATE OF MONTANA

Respondents.



On Petition for a Writ of Certiorari to
the Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION I

Whether an entity, in state government, can constitutionally exist and function, as "not simply an administrative law court functioning under the executive branch of government but is a special court created pursuant to Article 7 (Judicial Branch), section 1 of the 1972 Montana Constitution?"

QUESTION II

Do the Montana Supreme Court Internal Operating Rules qualify for asserting the affirmative defense of *res judicata* in ensuing court actions.

QUESTION III

Whether the Montana court of last resort, as a requirement of due process, is bound, by the American jurisprudence principle, of subject matter jurisdiction?

LIST OF ALL PROCEEDINGS

Allum v Montana State Fund and State of Montana, 2023 MT 121, DA 22-0625; Opinion entered June 20, 2023 (*Allum III*).

Allum v Montana State Fun, and State of Montana, WCC# 2022-5873 ("Workers' Compensation Court"); Judgment entered October 20, 2022.

Allum v. Montana State Fund, 2020 MT 159N, 400 Mont. 561, 464 P.3d 1012 (*Allum I*).

Allum v. State of Montana, No. 21-7823, *cert. denied*, October 3, 2022, (*Allum II*)

Allum v. State of Montana, U.S. District Court for Montana, CV 19-12-BU-BMM-KLD; Judgment entered October 27, 2020.

Complaint for Civil U.S. RICO Claims, Fourteenth Amendment Claims, Constitutional Challenges, and Pendant State Claims, filed in the U.S. District Court, in and for the District of Montana, Butte Division, on September 11, 2023.

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Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

The Order, denying the appeal, by the Montana Supreme Court, was filed June 20, 2023.

Opinions Below

The Order, of the Montana Supreme Court, dismissing the appeal, was filed June 20, 2023, and is attached at Appendix ("App.") "A." The Opinion is published as *Allum v Montana State Fund*, 2023 MT 121.

The judgment, of the state executive branch agency, "Workers' Compensation Court (WCC)," whose unconstitutionality, is at issue, herein, was filed, on October 10, 2022, and is attached as App. "B."

Constitutional Provisions Involved

Montana Constitution Article III, § 1 Separation of Powers:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Montana Constitution Article VII, § 1:

The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

Montana Constitution Article VII, § 2(2):

It has general supervisory control over all other courts.

Montana Constitution Article VII, § 4(2):

The legislature may provide for direct review by the district court of decisions of administrative agencies.

Montana Constitution Article VII, § 6(1):

Each district shall be formed of compact territory and be bounded by county lines.

Montana Constitution Article VII, § 8(1):

Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.

Montana Statutes

39-71-2901 MCA. Location of office -- court powers -- withdrawal -- substitution -- vacancy.

§ 39-71-2901 MCA is attached, as Appendix "E."

39-71-2903. Administrative procedure act and rules of evidence applicable.

All proceedings and hearings before the workers' compensation judge shall be in accordance with the appropriate provisions of the Montana Administrative Procedure Act. ***

History: En. 92-852 by Sec. 6, Ch. 537, L. 1975; R.C.M. 1947, 92-852(1); amd. Sec. 59, Ch. 464, L. 1987.

39-71-2904. Direct appeal to supreme court.

Notwithstanding 2-4-701 through 2-4-704, an appeal from a final decision of the workers' compensation judge

shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court in civil cases.

History: En. 92-852 by Sec. 6, Ch. 537, L. 1975; R.C.M. 1947, 92-852(2).

Administrative Rules of Montana

24.5.348 Certification of Decisions, Appeals to Supreme Court

(1) A party shall make any appeal from the Workers' Compensation Court as in the case of an appeal from a district court as provided in M. R. Civ. P. 72.

(2) For purposes of appeal, the court's final certification is considered a notice of entry of judgment.

(3) A party appealing from the Workers' Compensation Court shall comply with the Montana Rules of Appellate Procedure.

Montana Rules of Appellate Procedure

Rule 4. How and when to take an appeal or cross-appeal.

(1) Judgments defined.

(a) Final judgment. A final judgment conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding, ***

STATEMENT OF THE CASE

The petitioner, Robert L. Allum (Allum) was injured in an on-the-job accident, on November 18, 2013. Montana State Fund (State Fund) accepted Allum's claim for benefits. Allum underwent total knee replacement, in 2017. State Fund paid said claim benefits, until late 2018, when State Fund ceased paying Allum's claim benefits. This dispute, over the claim benefits, resulted in legal

action, being instituted, in two separate actions. The state court action was, *Allum v. Montana State Fund*, (*Allum I* App "C"), and the Montana U.S. District Court action was, *Allum v. State of Montana, et al.*, CV 19-12-BU-BMM-KLD.

Allum, on February 17, 2021, filed, in state district court, a case, *Allum v. State of Montana*, which the state court of last resort denied, on appeal, DA 21-0641, *cert. denied* No. 21-7823 (*Allum II*), for declaratory judgment on constitutional challenges, only. The complaint had no issues of fact, concerning any requests for workers' compensation benefits.

The total knee replacement surgery, in *Allum I*, required an additional revision knee surgery, in 2020, for which State Fund paid Allum's claim benefits. When Allum's revision knee surgery, still, resulted in medical issues, with Allum's knee, State Fund authorized, with reservation, diagnostic testing, on Allum's lower back. State Fund, in late 2022, ceased paying Allum's claim benefits. This dispute, over State Fund's cessation of the payment of Allum's benefits, resulted in the current legal action, *Allum v Montana State Fund*, (App "A") (*Allum III*).

QUESTION I

Whether an entity, in state government, can constitutionally exist and function, as "not simply an administrative law court functioning under the executive branch of government but is a special court created pursuant to Article 7 (Judicial Branch), section 1 of the 1972 Montana Constitution?"

This is a case of first impression. The petitioner can find no other example, in which a state entity, functioning as an administrative law court, in the executive branch, was created, pursuant to a judicial branch article, of a state constitution.

David M. Sandler (Sandler), Judge, in the WCC Order (App. "E," ¶ 2) (The entire Order is included, to put the statement, in context, and review the legal reasoning, for calling the "workers' compensation judge," a court.") stated:

WCC "is not simply an administrative law court functioning under the executive branch of government but is a special court created pursuant to Article 7, section 1 of the 1972 Montana Constitution.

The court of last resort, in *Allum III*, (App "A," ¶ 7) stated:

We have previously determined the WCC is a court of limited jurisdiction-"an administrative tribunal governed by MAPA and allocated to the Department of Labor and Industry for administrative purposes." *Thompson*, ¶ 24 [*Thompson v. State*, 2007 MT 185, ¶ 14, 338 Mont. 511, 167 P.3d 867].

The state court of last resort has, also, entered orders of supervisory control, in violation of the Montana Constitution, Article VII, §2(2), during the WCC portion, of *Allum I*, in *Allum v. State of Montana et al.*, Case No. OP 19-0597 and *Allum v. State of Montana et al.*, Case No. OP 19-0695.

The legislature has furthered the control, of the judicial branch, of WCC, in violation, of the Separation of Powers Clause (Montana Constitution, Article III, § 1), when the legislature, in 2021, amended § 39-71-2901(4) MCA to read "the

chief justice of the Montana supreme court shall appoint a substitute judge" to an Article VI executive branch, governor appointed "office of workers' compensation judge" position. Additionally, WCC, as a judicial "court," violates the Montana Constitution, Article VII, §§ 6(1) and 8(1).

WCC does not appear, in any enabling legislation. The "office of workers' compensation judge," was enacted, in 1975 (En. 92-850 by Sec. 4, Ch. 537, L. 1975), in the Department of Administration, with the "judge," appointed by the Governor, and later, the office was moved to the Department of Labor & Industry.

Montana's court of last resort established, by, *ipse dixit*, their creation, WCC, on July 16, 1976, in *Cosgrove v. Industrial Indemnity Co.*, Case No. 13265, by referring to the decision of the "office of workers' compensation judge," as the decision of the "Workers' Compensation **COURT**," on pages 1, 2, 4, and 7 of said decision. The Justices further, in *Skrukrud v. Gallatin Laundry Co.*, 171 Mont. 217, 557 P.2d 278 (Mont. 1976), continued, their practice, to refer to any appeal, from "the workers' compensation judge," as an appeal, from "the workers' compensation **court**," and, have continued said practice, until the present.

Sandler, in the above cited Order (App "E," ¶ 2) referred to himself as, "an administrative law court functioning under the executive branch of government," in a direct contradiction, to Sandler's claim, in (App "B"), page 2, footnote 5:

Although in a different context, **this Court** notes that it **has previously rejected Allum's claims that the Judge**

of the Workers' Compensation Court is part of the executive branch (emphasis added). ***

This is the first time (App "E"), Sandler makes the claim, WCC "is a special court created pursuant to Article 7, section 1 of the 1972 Montana Constitution."

QUESTION II

Do the Montana Supreme Court Internal Operating Rules qualify for asserting the affirmative defense of *res judicata*, in ensuing different court lawsuits.

The relevant portions, of the Montana Supreme Court Internal Operating Rules, state, in subsection 3 (c):

(i) **If an appeal presents no constitutional issues**, no issues of first impression, does not establish new precedent or modify existing precedent, or, in the opinion of the Court, presents a question controlled by settled law or by the clear application of applicable standards of review, the Court may classify that appeal as one for a memorandum opinion.

(ii) The decision of the case will provide the ultimate disposition without a detailed statement of facts or law. **The decision shall not be citeable as binding precedent, but may be cited when relevant to establishing the application of law of the case, res judicata** *** (emphasis added).

The petitioner raised, as a case of first impression, the constitutionality of WCC, and § 39-71-2904 MCA (violation of the Montana Constitution, Article VII, § 4(2)), in *Allum I*, therefore, 3(c)(i) was violated, by the court of last resort, in

relying upon the Montana Supreme Court Internal Operating Rules, as a basis for denying the appeal, relying on the internal rules, in *Allum I*.

The judgments, in each of the courts, following *Allum I*, accepted the affirmative defense of *res judicata*, over the objections, of the petitioner. The most egregious decision was stated, in *Allum II*, by the Montana court of last resort, in its Order, filed March 29, 2022, page 1:

Anticipating Allum's potential arguments in his response, the State argues that Allum has litigated his claims previously before multiple courts, including this Court. The State refers to Allum's issue about the unconstitutionality of the Workers' Compensation Court. *Allum v. Montana State Fund*, 2020 MT 159N, ¶ 4, 400 Mont. 561, 464 P.3d 1012 (*Allum I*). The State points out that it is prejudiced when there is a lack of finality to litigation and contends that dismissal is appropriate. M.R.App.P. 13(3)

IT IS ORDERED that the State's Motion to Dismiss Appeal is GRANTED and this appeal is DISMISSED with prejudice.

The egregiousness, of the state court of last resort's decision, in *Allum II*, is demonstrated by the decision, in *Allum I*, by the same court, with the same members:

¶ 1:

Pursuant to Section I, paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and **shall not be cited and does not serve as precedent** (emphasis added).

¶ 2:

***Allum asserts the WCC violates Montana's Constitution.

¶ 3:

Allum never raised a constitutional challenge in the WCC. He now argues that this Court and the WCC lack subject matter jurisdiction because the WCC is unconstitutional.

¶ 4:

This Court has consistently held that it will not consider issues raised for the first time on appeal. **“In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the [trial] court.”** *** By failing to first raise the issue in the WCC, Allum has waived any consideration of the issue on appeal. **We decline to address the constitutionality of the WCC under the guise of subject matter jurisdiction.** The judgment of the WCC is affirmed (emphasis added).

The court of last resort stated, in *Allum III*, in Footnote 1:

State Fund asserted Allum's constitutional challenges to be **precluded by res judicata, as he had brought the same constitutional claims in three prior WCC proceedings,** and were also precluded by **Allum's failure to file notice of his constitutional challenges as required by M. R. Civ. P. 5.1(a).** As we determine the issue on other grounds, it is not necessary to address these arguments (emphasis added).

The state court of last resort has now, identified a trifecta of reasons, to continue to avoid addressing the unconstitutionality, of WCC and § 39-71-2904

MCA:

1. continue using *res judicata*;
2. use the loss of jurisdiction, by WCC; and
3. use M.R. Civ. P. 5.1(a), in violation of § 39-71-2903 MCA (workers' compensation hearings are governed by Montana Administrative Procedures Act).

QUESTION III

Whether the Montana court of last resort, as a requirement of due process, is bound, by the American jurisprudence principle, of subject matter jurisdiction?

The simple answer is yes.

The Court, in *Williamson v. Berry*, 49 U.S. 495, 450, (8 How.) 495, 12 L. Ed. 1170, SCDB 1850-036, 1850 U.S. LEXIS 1687 (1850) stated the jurisprudence rule on jurisdiction of appellate courts:

But it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings.

The Court, in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006) stated, "Courts *** have an independent obligation to determine whether subject-matter jurisdiction exists[.]"

The subject matter jurisdiction question, for the WCC, is whether WCC is constitutionally established. What is the legislative enabling act?

The subject matter jurisdiction issue, for the state court of last resort, is twofold: (1) is WCC a constitutional entity; and (2) is WCC an executive branch agency entity (Montana Constitution, Article VII, § 4(2)).

Montana's ARM 24.5.348, specifies "the court's final certification is considered a notice of entry of judgment."

A judgment and order, in the WCC Case (App "B"), beneath the heading "In the Workers' Compensation Court of the State of Montana," read "Filed, October 20, 2022," in the "Office of Workers' Compensation Judge, Helena, Montana," signed by "David M. Sandler, Judge," with the seal of "Workers' Compensation Court, State of Montana." Said Order, in ¶11 states:

IT IS FURTHER ORDERED AND ADJUDGED that all claims and issues in this case that were properly before this Court have been adjudicated and the rights of the parties have been conclusively determined (emphasis added).

Thus, a final and appealable judgment and order appeared to have been entered, in WCC, pursuant to Montana's appropriate ARM and M.R.A.P. Yet, the state court of last resort denied the instant appeal, *Allum III*, in ¶ 8:

As Allum resolved all of his benefit disputes, **via the WCC-approved settlement**, as a matter of law the WCC did not have jurisdiction over the remaining stand-alone constitutional challenges. The WCC's conclusions of law were correct (emphasis added).

Allum and State Fund, "[o]n October 18, 2022, filed their Joint Petition and

Stipulation for Entry of Judgment" (App "B," Doc. # 53 ¶ 4), and the judgment and order, in the Case, was filed, October 20, 2022; therefore, if WCC lost jurisdiction, when "Allum resolved all of his benefit disputes," then WCC lost jurisdiction, prior to entering and certify the final judgment, resulting in the court of last resort, statutorily being without subject matter jurisdiction, or appellate jurisdiction (M.R.A.P. Rule 5(a)(i)), to adjudicate *Allum III*, if, as stated, in ¶ 9 Conclusion:

Because Allum resolved all of his benefit disputes, the WCC did not have jurisdiction over his remaining stand-alone constitutional challenges.

The decision, of the state court of last resort, is void, for lack of both, subject matter and appellate jurisdiction.

The U.S. District Court Complaint (App "F"), filed September 11, 2023, demonstrates, more completely, the need for the constitutionality, of WCC and § 39-71-2904 MCA, to be adjudicated, especially, in light of Seventh Claim for Relief, Constitutional Challenges, and the actions, of the Montana court of last resort and other branches of government. The Complaint, also, demonstrates the new and separate claims for relief, being pursued, because of the new and separate benefit claim, of the petitioner.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ of certiorari:

1. Only this Court, can require a state court of last resort to address

the constitutionality of an entity, who claims the entity "is an administrative law court, functioning under the executive branch, of government, but is also, a special court created, pursuant to the judicial branch, of the state constitution."

2. Only this Court, can clarify, and correct, the misuse, of the affirmative defense, of *res judicata*, based upon the internal rules, of a state court of last resort, in federal and state cases.

3. Only this Court, can clarify, and correct, the misuse, of subject matter jurisdiction between the Montana state courts and the remaining American state and federal judicial system.

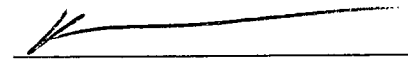
4. Only this Court can restore due process rights, to the judicial procedures, governing injured workers of Montana.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 18th day of September, 2023.

Respectfully submitted,



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