

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 18

WCC No. 2008-2046

KATHY BENTON

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

UNINSURED EMPLOYERS' FUND

Third-Party Petitioner

vs.

ROBERT HARRYMAN and SUSAN HARRYMAN

Third-Party Respondents.

**ORDER GRANTING UNINSURED EMPLOYERS' FUND'S MOTION FOR LEAVE TO
FILE A THIRD-PARTY PETITION FOR INDEMNITY AND AMENDING CAPTION**

Summary: The Uninsured Employers' Fund moved for leave to file a third-party petition for indemnity against alleged uninsured employers, Robert Harryman and Susan Harryman, on the grounds that recently enacted legislation (Chapter 112, Laws of 2009) provides that the Harrymans should be parties to this case, and allows the UEF to seek indemnification from them in the event this Court determines the UEF is liable to Petitioner Kathy Benton. Petitioner opposes the UEF's motion and argues that retroactive application of the new legislation is prohibited because the legislation impairs her rights and imposes new obligations on her.

Held: The UEF's motion is granted. The Harrymans were initially dismissed from this action, *sua sponte*, because the Court determined the due process requirements of the then-existing version of § 39-71-506, MCA, were not satisfied. In the same Order, the Court allowed them to seek leave to intervene in order to protect their due process rights. The Harrymans then moved to intervene or, in the alternative, sought reconsideration of the Order dismissing them from the action. Due process requires that the Harrymans be allowed to participate in this action in some capacity. As this pertains to Petitioner's rights and obligations, the Court fails to appreciate the distinction between the Harrymans' participation in this case as intervenors or as third-party respondents.

Topics:

Uninsured Employers' Fund: Indemnification. Where the UEF sought leave to file a third-party petition against the alleged uninsured employers on the grounds that recently enacted legislation provides that the alleged uninsured employers should be parties to the case, and Petitioner argued that the legislation should not be applied retroactively, the Court granted the UEF's motion, holding that, notwithstanding the express retroactivity provision in the legislation, due process requires that the alleged uninsured employers be allowed to participate in the action in some capacity.

¶ 1 Respondent Uninsured Employers' Fund (UEF) moves this Court for leave to file a third-party petition for statutory indemnity against the alleged uninsured employers, Robert Harryman and Susan Harryman (Harrymans), on the grounds that recently enacted legislation (Chapter 112, Laws of 2009) provides that the Harrymans should be parties to this case, and allows the UEF to seek indemnification from the Harrymans in the event this Court determines the UEF is liable to Petitioner Kathy Benton. Petitioner opposes the UEF's motion and argues that retroactive application of the new legislation is prohibited because the legislation impairs her rights and imposes new obligations on her.

¶ 2 On January 16, 2009, I dismissed the Harrymans from this case pursuant to my earlier ruling in *Raymond v. Uninsured Employers' Fund*.¹ After dismissal, the Harrymans moved to intervene in the case, or in the alternative, sought reconsideration of the Court's Order dismissing them. On April 1, 2009, House Bill 119 was signed by the Governor and enrolled as Chapter 112, Laws of 2009. This legislation provides, in relevant part, that an uninsured employer or alleged uninsured employer is a party to all disputes concerning any benefits for which the employer may become obligated to indemnify the department.²

¹ *Raymond*, 2008 MTWCC 45.

² Chapter 112, Laws of 2009, Sec. 3(1).

¶ 3 The issue before the Court is whether Chapter 112, Laws of 2009 should be applied retroactively in this case. Section 1-2-109, MCA, provides that no law in any of the statutes of Montana is retroactive unless expressly so declared. Chapter 112, Laws of 2009, Section 30, declares, “[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] and to actions pending within . . . the workers’ compensation court on [the effective date of this act]”

¶ 4 Notwithstanding the express retroactivity provision of Section 30, Petitioner argues that the new legislation should not be applied retroactively because it impairs her rights and imposes new obligations on her. Specifically, Petitioner argues that if the Harrymans are joined as third-party respondents, Petitioner “must respond to a second defendant [sic] to defend allegations which never before required response.”³ Petitioner misapprehends the nature of the UEF’s proposed third-party petition. Contrary to Petitioner’s characterization, if the UEF’s motion is granted, the Harrymans will not become a “second defendant” against whom Petitioner must “defend.” Rather, the Harrymans will be third-party respondents to the UEF’s claim for indemnification.

¶ 5 To the extent Petitioner may be required to deal with additional parties to this litigation, this would be the case irrespective of whether the UEF’s motion to file a third-party petition is granted. The Harrymans were initially dismissed from this action, *sua sponte*, because I determined the due process requirements of the then-existing version of § 39-71-506, MCA, were not satisfied.⁴ Mindful that the Harrymans continued to have a vested interest in this case, I expressly allowed them to seek leave to intervene in order to protect their due process rights. Pursuant to my Order, the Harrymans moved to intervene or, in the alternative, sought reconsideration of my Order dismissing them from the action. Due process requires that the Harrymans be allowed to participate in this action in some capacity. As this pertains to Petitioner’s rights and obligations, I fail to appreciate the distinction between the Harrymans participation in this case as an intervenor or as a third-party respondent.

³ Petitioner’s Response to UEF’s Motion for Leave to File a Third [P]arty Petition at 3, Docket Item No. 98.

⁴ Order Dismissing Uninsured Employers and Changing Caption, Docket Item No. 72.

ORDER

¶ 6 The UEF's motion for reconsideration of the Court's January 16, 2009, Order⁵, as well as the Harrymans' motion to intervene or in the alternative for reconsideration⁶ are deemed **MOOT**.⁷

¶ 7 The UEF's motion for leave to file a third-party petition is **GRANTED**.

¶ 8 The UEF's third-party petition, a copy of which is attached as Exhibit 1 to the UEF's motion for leave to file a third-party petition for indemnity, will be filed effective the date of this Order.

¶ 9 The Harrymans shall have ten days from the date of this Order to file their response to the UEF's third-party petition.

¶ 10 The caption shall be amended as reflected above for purposes of all future pleadings.

DATED in Helena, Montana, this 3rd day of June, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: James P. O'Brien
Mark Cadwallader
Charles G. Adams
Submitted: May 8, 2009

⁵ Uninsured Employers' Fund's Motion for Reconsideration of the Court's January 16, 2009, *Order Dismissing Uninsured Employer and Changing Caption*, Docket Item No. 82.

⁶ Motion to Intervene or in the Alternative for Reconsideration of the Court's Order Dismissing Harrymans, Docket Item No. 75.

⁷ See Minute Book Hearing No. 4048A at 2, Docket Item No. 96.