

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 31

WCC No. 2011-2651

WILLIAM J. CLEEK

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent and Third Party Petitioner

vs.

US TIRE & WHEEL CO.

Third Party Respondent.

ORDER GRANTING PETITIONER'S MOTION TO AMEND PETITION FOR HEARING

Summary: Petitioner moved to file an amended Petition for Hearing in order to: 1) add Montana State Fund as an additional named party; and 2) add the issue of Respondent's claim for reimbursement of benefits. Respondent Uninsured Employers' Fund opposed Petitioner's motion on the grounds that the amendments Petitioner seeks to make are time-barred and do not relate back to the original pleading.

Held: Motion to amend is granted. Leave to amend a pleading shall be freely given as justice so requires. In this case, the amendments which Petitioner seeks to make to his petition relate back to his original injury. Whether the issues that are the subject of his proposed amendments are time-barred are more properly addressed by way of a dispositive motion rather than denial of a motion to amend.

Topics:

Pleading: Amendment. Petitioner moved to amend his Petition to add an insurer as an additional party and to add the issue of the UEF's demand for repayment of benefits. Since there is no scheduling order governing the deadline for filing Petitioner's motion to amend, leave to amend shall

be freely given when justice so requires, and this Court may grant joinder on such terms and conditions as are necessary to protect the interests of the existing parties, including the interest of a speedy remedy.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.308. Since there is no scheduling order governing the deadline for filing Petitioner's motion to amend, this Court may grant joinder on such terms and conditions as are necessary to protect the interests of the existing parties, including the interest of a speedy remedy.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Insofar as the UEF contends that Petitioner must repeatedly request mediation then petition this Court every time the UEF makes a "determination" on Petitioner's claim, here there is one claim for benefits, one date of injury, and one issue regarding compensability of the claim which was being paid on a disputed liability basis. There is no dispute that Petitioner timely filed for mediation then timely petitioned this Court. Montana is a notice-pleading state; all subsequent and subjacent issues are a consequence of that initial dispute, i.e.: denial of the claim, termination of benefits, and demand for repayment. All relate to the compensability of Petitioner's claim, and all relate back to the original petition before this Court. Therefore, the parties have already complied with the requirements of mediation on these issues.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Where a claim is denied, mediation of that denial encompasses all subjacent compensation issues whether or not they are specifically mentioned in the request for mediation. For the UEF to maintain that its right to reimbursement is unassailable and its denial of liability uncontestable because Petitioner did not re-mediate his claim every time the UEF made a new determination, strains credulity. The initial petition, timely mediated and timely filed, seeks a determination as to whether Petitioner's claim is compensable and whether the UEF is liable for payment of his benefits. These issues are in dispute and properly before this Court.

Mediation: General. Insofar as the UEF contends that Petitioner must repeatedly request mediation then petition this Court every time the UEF makes a "determination" on Petitioner's claim, here there is one claim for benefits, one date of injury, and one issue regarding compensability of the

claim which was being paid on a disputed liability basis. There is no dispute that Petitioner timely filed for mediation then timely petitioned this Court. Montana is a notice-pleading state; all subsequent and subjacent issues are a consequence of that initial dispute, i.e.: denial of the claim, termination of benefits, and demand for repayment. All relate to the compensability of Petitioner's claim, and all relate back to the original petition before this Court. Therefore, the parties have already complied with the requirements of mediation on these issues.

Uninsured Employers' Fund: Generally. Where a claim is denied, mediation of that denial encompasses all subjacent compensation issues whether or not they are specifically mentioned in the request for mediation. For the UEF to maintain that its right to reimbursement is unassailable and its denial of liability uncontestable because Petitioner did not re-mediate his claim every time the UEF made a new determination, strains credulity. The initial petition, timely mediated and timely filed seeks a determination as to whether Petitioner's claim is compensable and whether the UEF is liable for payment of his benefits. These issues are in dispute and properly before this Court.

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¶ 1 In his Petition for Hearing, Petitioner William Cleek alleged an injury on or about August 30, 2010, while employed with US Tire & Wheel Co. (US Tire), an uninsured employer.¹ The Uninsured Employers' Fund (UEF) placed his claim in a "pending status" under § 39-71-608, MCA, and Cleek contended that he was entitled to acceptance of his claim.²

¹ Petition for Hearing (Petition) at 1, ¶¶ 1, 2, Docket Item No. 1.

² *Id.* at 2-3, ¶ 3.

¶ 2 In its response to the petition, the UEF admitted that US Tire was uninsured, that benefits were being paid under § 39-71-608, MCA, and that mediation requirements had been met.³ It also asserted, as an affirmative defense, that in the event the claim was not found compensable, the UEF was entitled to reimbursement of all benefits paid under a full reservation of rights.⁴

¶ 3 The UEF filed a Third-Party Petition,⁵ US Tire filed responses to both petitions,⁶ and this matter proceeded forward through discovery.

¶ 4 On July 8, 2011, Cleek's original counsel filed a Motion to Withdraw as Counsel of Record.⁷ Following a telephonic conference call on July 12, 2011,⁸ with both Cleek and his counsel present by phone, I granted the motion.⁹

¶ 5 On September 9, 2011, a telephonic conference call was held by the Court with all parties in attendance.¹⁰ Cleek, now *pro se*, advised that he had been paid by companies other than US Tire. Montana State Fund (State Fund) was discussed as a potential insurer on risk for his injury. I indicated to the parties that any additional uninsured employer that may be responsible for indemnification needed to be added as a party, and that if the State Fund were found to be an insurer potentially on risk for the injury, then it likely should be added as well.

¶ 6 During the conference call on September 9, 2011, I responded to the concerns of the UEF's counsel by indicating that if the issues in dispute remained the same, I did not believe the matter would need to be re-mediated. However, this would change if additional parties were named. I then vacated the current trial setting and placed the matter in abeyance to allow the parties more time to determine if others should be joined in the proceeding.

³ Uninsured Employers' Fund's Response to the Petition for Hearing (UEF Response) at 1-2, ¶¶ 2, 3, Docket Item No. 5.

⁴ *Id.* at 2, ¶ 11.

⁵ Uninsured Employers' Fund's Third-Party Petition for Indemnity and Request for Amended Caption, Docket Item No. 3.

⁶ Response to Petition (US Tire's Response), Docket Item No. 7; Third Party Respondent's Response to UEF's Third Party Petition for Indemnity (US Tire's Third Party Response), Docket Item No. 16.

⁷ Docket Item No. 34.

⁸ Minute Book Hearing No. 4289, Docket Item No. 36.

⁹ Docket Item No. 37.

¹⁰ Minute Book Hearing No. 4309, Docket Item No. 50.

¶ 7 On December 9, 2011, Cleek’s new counsel filed a Notice of Appearance.¹¹ On March 27, 2012, Cleek filed a Motion to Amend Petition for Hearing and Memorandum in Support.¹² In his memorandum, Cleek asserted that mediation was held on January 9, 2012, on the issue of the State Fund’s liability for Cleek’s claim for benefits on behalf of its insured, Montana Cattle Co., Inc. Cleek now seeks to amend the original Petition for Hearing to add State Fund as an additional party, as well as add the issue of the UEF’s demand for repayment of benefits.

¶ 8 State Fund has not filed a response to Cleek’s motion because it is not presently a party to the matter and has not been formally served with any pleadings.¹³

¶ 9 In its response to Cleek’s motion, the UEF alleges that each time it made a decision on Cleek’s claim subsequent to the original Petition for Hearing – when it terminated his benefits and demanded reimbursement, then denied his claim – Cleek had to again satisfy the time constraints of § 39-71-520, MCA, by requesting mediation within 90 days, then appealing the mediator’s decision to this Court within 60 days.¹⁴

¶ 10 Although Cleek timely sought mediation and timely filed his petition after the UEF initially refused to accept liability for his claim, the UEF argues that Cleek was required to again timely request mediation following the UEF’s termination of his benefits and the UEF’s demand for reimbursement. The UEF further argues that Cleek was required to timely file a motion to amend his petition following mediation of the issues of whether State Fund or the UEF were liable for Cleek’s claim and the denial of his claim by the UEF. The UEF argues that because Cleek failed to timely request mediation on the termination of benefits and demand for repayment, it is “final and binding that the Petitioner owes the UEF an overpayment of \$19,083.24.”¹⁵

¹¹ Docket Item No. 57.

¹² Docket Item No. 65.

¹³ E-mail to Clerk of Court dated April 4, 2012, Docket Item No. 66.

¹⁴ Uninsured Employers’ Fund’s Response to Petitioner’s Motion to Amend Petition for Hearing (UEF Response to Petitioner’s Motion) at 2, Docket Item No. 67.

¹⁵ *Id.*, at 4.

DISCUSSION

¶ 11 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Cleek's industrial accident.¹⁶

¶ 12 In the instant proceeding, Cleek already has a pending Petition for Hearing. He was afforded additional time to determine whether he wished to add State Fund and if so, to file for mediation to include State Fund.¹⁷ As Cleek has now satisfied the prerequisite of notice to and mediation with State Fund pursuant to § 39-71-2905, MCA, he now properly moves to add State Fund as a party.

¶ 13 The motion to amend is governed by ARM 24.5.308 and 24.5.316 and M. R. Civ. P. 14, 15, 19, 20, and 21. Since under ARM 24.5.316(1), there is presently no scheduling order governing the deadline for filing Petitioner's motion to amend, this Court may "grant joinder on such terms and conditions as are necessary to protect the interests of the existing parties, including the interest of a speedy remedy."¹⁸

¶ 14 Further, "[l]eave to amend a petition shall be freely given when justice so requires."¹⁹ Here, Cleek asserts that "coverage from Montana State Fund through Montana Cattle Co. may be viable and seeks a judicial determination on that point."²⁰

¶ 15 Leave to amend to join State Fund appears warranted for a full adjudication of the issues concerning Cleek's injury, and whatever liability State Fund may or may not have in this matter relates back to the original date of injury without evident prejudice.²¹

¶ 16 As to the issue of reimbursement, I note that the UEF asserted the affirmative defense of a right to reimbursement from Cleek in its response to Cleek's original petition.²² I therefore fail to see how Cleek's dispute over the UEF's right to reimbursement does not relate back to the original pleadings in this matter.

¹⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹⁷ Minute Book Hearing No. 4309.

¹⁸ ARM 24.5.308(2).

¹⁹ *Flynn, et al. v. Montana State Fund and Liberty Northwest Ins. Corp.*, 2010 MTWCC 26, ¶ 3, citing *Higgins v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 31, ¶ 6; M. R. Civ. P. 15(a).

²⁰ Memorandum in Support of Motion to Amend Petition for Hearing (Petitioner's Memorandum), at 3.

²¹ M. R. Civ. P. 15(c).

²² UEF Response at 2, ¶ 11.

¶ 17 Insofar as the UEF contends that Cleek must repeatedly request mediation then petition this Court every time the UEF makes a “determination”²³ on Cleek’s claim, in this case there is one claim for benefits, one date of injury, and one issue regarding compensability of the claim which was being paid on a disputed liability basis. There is no dispute that when the UEF initially refused to accept liability, Cleek timely filed for mediation, then timely petitioned this Court. Montana is a notice-pleading state;²⁴ all subsequent and subjacent issues are a consequence of that initial dispute, i.e.: denial of the claim, termination of benefits, and demand for repayment of benefits. All relate to the compensability of Cleek’s claim, and all relate back to the original petition before this Court. Therefore, the parties have already complied with the requirements of mediation on these issues.

¶ 18 The reasoning in *Dunn v. Indemnity Ins. Co. of North America*²⁵ is applicable here. In *Dunn*, this Court held that an insurer was not entitled to dismissal of a claimant’s claim for permanent partial disability benefits simply because that specific issue was not mediated: “[W]here a claim is denied, mediation of that denial encompasses all subjacent compensation issues whether or not they are specifically mentioned in the request for mediation.”²⁶

¶ 19 For the UEF to maintain as it does in its response to Cleek’s motion that its right to reimbursement is unassailable and its denial of liability uncontestable because Cleek did not remediate his claim every time the UEF made a new determination, strains credulity. Cleek’s initial petition – timely mediated and timely filed in this Court – seeks a determination as to whether Cleek’s claim is compensable and whether the UEF is liable for payment of his benefits. These issues are in dispute and properly before this Court.

¶ 20 As the issues raised in Cleek’s motion have been mediated, and as leave to amend a pleading shall be freely given when justice so requires, I find that justice is best served by granting Cleek’s motion to amend.

²³ § 39-71-520, MCA; UEF Response to Petitioner’s Motion at 2-3.

²⁴ *Oster v. State Comp. Ins. Fund*, 1995 MTWCC 85.

²⁵ *Dunn v. Indemnity Ins. Co. of North America*, 2002 MTWCC 38, reaffirming *Burner v. Uninsured Employer’s Fund*, 1998 MTWCC 81.

²⁶ *Id.*, ¶ 2.

ORDER

¶ 21 For the foregoing reasons, the Petitioner's motion to amend is **GRANTED**.

¶ 22 Petitioner shall serve his First Amended Petition on or before August 28, 2012.

DATED in Helena, Montana, this 8th day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Howard Toole
Leanora O. Coles
Molly Howard
Daniel B. McGregor
Submitted: April 19, 2012