

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 26

WCC No. 2000-0222

ROBERT FLYNN and CARL MILLER, Individually and on
Behalf of Others Similarly Situated

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

ORDER GRANTING PETITIONERS' MOTION TO AMEND PETITION FOR HEARING

Summary: Petitioners ask the Court for leave to amend their Petition for Hearing to include claims for attorney fees and penalties, alleging that the insurers have failed to identify and pay benefits owing to claimants whose entitlement to those benefits are undisputed.

Held: Petitioners' motion to amend is granted. Leave to amend is freely granted where justice so requires. Petitioners filed their motion to amend in accordance with the deadlines set by this Court.

Topics:

Pleading: Amendments. Leave to amend a petition shall be freely given when justice so requires and denied when the proposed amendments, on their merits, would be futile. Petitioners filed a motion to amend their petition to include attorney fees and a penalty in accordance with the deadlines set by the Court. Common Fund insurers argued that Petitioners' motion should be denied because the insurers believed

Petitioners would ultimately be unsuccessful in their plea for attorney fees and a penalty. The Court held that insurers' arguments were premature and offered no basis for denying the requested amendment.

Pleading: Attorney Fees. Petitioners may amend their petition to include claims for attorney fees where Petitioners alleged that they could not have raised the issue sooner because the insurers' allegedly unreasonable actions only arose recently in the course of the litigation.

Attorney Fees: Request For. Petitioners may amend their petition to include claims for attorney fees where Petitioners alleged that they could not have raised the issue sooner because the insurers' allegedly unreasonable actions only arose recently in the course of the litigation.

Penalties: Insurers. Petitioners may amend their petition to include claims for a penalty where Petitioners alleged that they could not have raised the issue sooner because the insurers' allegedly unreasonable actions only arose recently in the course of the litigation.

Attorney Fees: Timeliness of Request. Common Fund Insurers' alleged that Petitioners' motion to amend was untimely: 1) because the *Flynn* petition was "fully and finally adjudicated" and therefore could not be amended since ARM 24.5.301(3) requires any penalty or attorney fee claims to be joined and pleaded in the petition; and 2) because Petitioners' claim for attorney fees and penalties advances a "new theory on unsuspecting opponents." The Court concluded that Petitioners' motion was timely because *Flynn* has not been fully and finally adjudicated and the insurers cannot claim to be "unsuspecting," as they are aware of their obligations under the Workers' Compensation Act.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.301. ARM 24.5.301(3) requires any penalty or attorney fee claims to be joined and pleaded in the petition. Here, Petitioners asserted that they could not have claimed attorney fees and a penalty sooner because the insurers' allegedly unreasonable actions only arose recently in the course of the litigation. Because Petitioners' motion was filed in accordance with Court deadlines and because Respondents provided no basis for denying the requested amendment, the Court granted Petitioners' motion to amend their petition.

¶1 Petitioners move the Court for leave to amend their Petition for Hearing to include claims for attorney fees and penalties, alleging that the insurers have failed to identify and pay benefits owing to claimants whose entitlement to those benefits are undisputed.¹ Common Fund Insurers² object to Petitioners' motion to amend.³ Common Fund Insurers raise the following grounds upon which they believe the Court should deny Petitioners' motion:

1. There has been no order requiring responding insurers to identify and pay potential *Flynn* beneficiaries;
2. No claims have been presented to responding insurers for retroactive benefits under *Flynn*;
3. Petitioners cannot allege the facts which must be included in a petition pursuant to ARM 24.5.301;
4. Petitioners fail to offer any evidence that responding insurers have acted unreasonably; and
5. Petitioners' motion to amend is untimely.

¶2 Petitioners argue that, except for their untimeliness argument, Common Fund Insurers do not address the procedural matter of whether Petitioners should be allowed to amend their petition. Rather, Common Fund Insurers address whether Petitioners

¹ Petitioners' Motion to Amend Petition for Hearing and Brief in Support, Docket Item No. 606.

² AIU Ins. Co., American International Pacific Ins. Co., American Home Assurance Co., Birmingham Fire Ins. Co., Commerce & Industry Ins. Co., Granite State Ins. Co., Ins. Co. of the State of Pennsylvania, National Union Fire Ins. Co. of Pittsburgh, Pa, New Hampshire Ins. Co., AIG National Ins. Co., American International Specialty Lines Ins., American International Ins. Co., Illinois National Ins. Co., American General Corp., American Alternative Ins. Corp., American Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Bituminous Casualty Corp, Old Republic Ins. Co., Old Republic Security Assurance Co., Centre Ins. Co., Clarendon National Ins. Co., Everest National Ins. Co., Truck Ins. Exchange, Mid Century Ins. Co., Farmers Insurance Exchange, Federal Express Corporation, Great American Ins. Co., Great American Ins. Co. of NY, Great American Assurance Co., Great American Alliance Ins. Co., Great American Spirit Ins. Co., Republic Indemnity of America, Hartford Accident & Indemnity Co., Hartford Casualty Ins. Co., Hartford Fire Ins. Co., Hartford Ins. Co. of the Midwest, Hartford Underwriters Ins. Co., Property & Casualty Ins. Co. of Hartford, Sentinel Ins. Co. Ltd., Twin City Fire Ins. Co., Trumbull Ins. Co., Markel Ins. Co., Petroleum Casualty Co., SCOR Reinsurance Co., Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins. Co., PPG Industries, Inc., Connie Lee Ins. Co., Fairfield Ins. Co., United States Aviation Underwriters, Universal Underwriters Group, XL Ins. America, Inc., XL Ins. Co. of New York, XL Reinsurance America, XL Specialty Ins. Co., Greenwich Ins. Co., Zurich North America, American Guarantee & Liability Ins. Co., American Zurich Ins. Co., Assurance Co. of America, Colonial American Casualty & Surety, Fidelity & Deposit Co. of Maryland, Maryland Casualty Co., Northern Ins. Co. of New York, Valiant Ins. Co., Zurich American Ins. Co., and Zurich American Ins. Co. of Illinois.

³ Common Fund Insurers' Response to Petitioner's Motion to Amend (Response Brief), Docket Item No. 610.

have demonstrated that they can ultimately prevail on these issues.⁴ Petitioners' argument is well-taken.

¶3 Leave to amend a petition shall be freely given when justice so requires.⁵ Leave to amend is denied in cases when the proposed amendments would, on their merits, be futile.⁶ Recently, I held that a party's proposed amendment to include a claim for attorney fees would be futile where the claim was clearly proscribed by statute.⁷ In the present case, while Common Fund Insurers advance several arguments as to why they believe the evidence will demonstrate that they have not acted unreasonably and therefore cannot be subject to an award of penalties and attorney fees, none of these arguments indicate that Petitioners' proposed amendment would be futile. Common Fund Insurers' arguments as to the merits of Petitioners' proposed request for penalty and attorney fees is premature, and does not provide a basis for denying the requested amendment.

¶4 Common Fund Insurers also set forth two bases upon which they allege Petitioners' motion to amend is untimely. First, they argue that the *Flynn* petition has been "fully and finally adjudicated" and therefore cannot be amended since ARM 24.5.301(3) requires any penalty or attorney fee claims to be joined and pleaded in the petition. Second, they argue that asserting a claim for penalties and attorney fees advances "a new theory on unsuspecting opponents."⁸

¶5 As Petitioners point out in their reply brief, the *Flynn* matter has not been fully and finally adjudicated. In fact, Petitioners' motion was filed in accordance with a briefing deadline set by this Court to identify and resolve any outstanding issues remaining in this litigation. As to Common Fund Insurers' argument that Petitioners' proposed amendment should not be granted because it advances "a new theory on unsuspecting opponents," Petitioners reply that Common Fund Insurers cannot claim to be "unsuspecting," as they are aware of their obligations to act reasonably in handling claims under the Workers' Compensation Act. Petitioners further note that their request to amend the petition is a request to include a "new theory," because the conduct of insurers only recently gave rise to the grounds upon which they believe they may be entitled to penalties and attorney fees.

⁴ Reply Brief in Support of Petitioners' Motion to Amend Petition for Hearing, Docket Item No. 613.

⁵ *Higgins v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 31, ¶ 6 (citing Mont. R. Civ. P. 15(a)).

⁶ *Montana State Fund v. Uninsured Employers' Fund and Folda*, 2010 MTWCC 10, ¶ 6 (citing *Citizens Awareness Network v. Montana Bd. of Env'tl. Review*, 2010 MT 10, ¶ 16, 355 Mont. 60, 227 P.3d 583).

⁷ *Id.*

⁸ Response Brief at 3-4.

¶6 Common Fund Insurers have advanced no grounds which persuade me to deny Petitioners' request to amend their petition. Leave to amend a petition shall be freely given when justice so requires. Petitioners filed their motion to amend in accordance with the deadlines set by this Court. Whether or not Petitioners may ultimately be successful in their claim for penalties and attorney fees is not a basis for precluding the amendment. Petitioners have alleged that the insurers' actions in this litigation which give rise to Petitioners' belief that they may be entitled to penalties and attorney fees only occurred recently and therefore Petitioners could not have raised this issue sooner. Petitioners' motion to amend the petition to include a plea for attorney fees and a penalty is therefore granted.

ORDER

¶7 For the reasons set forth above, Petitioners' motion to amend is **GRANTED**.

¶8 Petitioners shall file their amended petition in conformance with this Order on or before July 28, 2010.

DATED in Helena, Montana, this 14th day of July, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Submitted: December 11, 2009