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**FILED**

**MAY 21 2003**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT FOR THE STATE OF MONTANA**

<b>MARK MATHEWS,</b>	)	<b>WCC Number 2001-0294</b>
	)	
<b>Petitioner,</b>	)	<b>REPLY IN SUPPORT OF</b>
	)	<b>MOTION TO FILE AMENDED</b>
<b>vs.</b>	)	<b>PETITION FOR HEARING</b>
	)	
<b>LIBERTY NORTHWEST INSURANCE</b>	)	
<b>CORPORATION,</b>	)	
	)	
<b>Respondent.</b>	)	

Liberty Northwest does not raise any valid objection to the motion to amend. Mark Mathews' motion to amend petition for hearing should be granted. The merits of an amended petition are matters to be resolved **after** the filing of an amended petition. Liberty Northwest simply argues that it may defeat Mark Mathew's claims later so the amended petition should not be allowed now. The rules and past decisions of the workers' compensation court do not support such a result. The motion to amend should be granted.

Liberty Northwest argues that its filing of a document called Notice of Affirmative Defense filed July 16, 2001 (four and one-half months after Respondent's Answer) somehow precludes Mark Mathews from filing an amended petition. Liberty Northwest cites no support for this position because none exists.

On July 20, 2001 Mark Mathews moved to strike the Notice of Affirmative Defense which in essence was an amendment to the pleadings (Answer) without the requisite court approval. Mark Mathews moved to dismiss the affirmative defense because it was raised for the first time after the employer's deposition, after the close of discovery and after petitioner's deposition.

BJS Construction waited until after the close of Brian Schroeder's deposition, President of BJS Construction, after the closure of formal discovery, to place Mark Mathews on notice that it would later raise the affirmative defense of fraudulent inducement. *Deposition of Brian Schroeder, pp. 46-47.* BJS

Constructions' timing prevented Mark Mathews from inquiring of Brian Schroeder into the facts which may support its contention that fraudulent inducement exists. BJS Construction compounded this 'trial by ambush' strategy by failing to affirmatively plead the facts which it contends support fraudulent inducement once it raised this affirmative defense. BJS Construction failed to plead any facts with specificity which it may prove to establish the nine elements of fraud.

*Motion to Strike.*

Affirmative defenses must be pled affirmatively. Liberty Northwest failed to plead the affirmative defense and therefore it was waived.

Liberty Northwest provides no support for its objection to the motion to amend other than its self-interested contention that the amended petition may not result in benefits if it succeeds in filing and proving the affirmative defense of fraudulent inducement. There is no support for Liberty Northwest's position. Mark Mathews motion to amend should be granted.

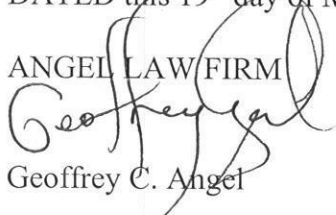
The employer controls the workers' status as an employee and therefore fraudulent inducement in this context is a factual and legal impossibility. The Notice of Affirmative Defense amended the pleading (Answer) without leave of court *after* the discovery deadline, raises an affirmative defense that was waived, pleads an affirmative defense that was denied by the Court as a matter of law when it dismissed the petition which was appealed to the Supreme Court and raises an affirmative defense that simply cannot be.

If it walks like a duck and quacks like a duck, even if god (in this context the employer) who created it says it was tricked into believing it was a goose it remains a duck.

For these reasons Mark Mathews asks that the motion to consolidate and motion to amend petition for hearing be granted.

DATED this 19<sup>th</sup> day of May 2003.

ANGEL LAW FIRM


  
Geoffrey C. Angel

CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of May 2003 I served a copy of the foregoing on Respondent by first class mail, postage prepaid, and addressed as follows:

**Larry W. Jones, Senior Attorney  
Liberty Northwest Insurance Corporation  
700 S.W. Higgins, Avenue 250  
Missoula, Montana 59803-1429**

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