

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 21

WCC No. 2012-2904

LYNN GERBER

Petitioner

vs.

MONTANA STATE FUND

Respondent.

ORDER DENYING PETITIONER'S MOTIONS FOR JOINDER
AND CLASS ACTION STATUS

Summary: Petitioner moved for joinder of his petition with that of another, and subsequently clarified that he also seeks class action status. Respondent opposed Petitioner's motions, arguing that Petitioner has not proven that he is entitled to joinder or class action status.

Held: Although Petitioner contends that his case meets the requirements for joinder and for class action status, he has put forth no evidence in support of his contentions. His motions are therefore denied.

Topics:

Procedure: Pretrial Procedure: Motion for Joinder. The Court denied Petitioner's motion for joinder where the Court found Petitioner failed to meet his burden of proof by offering only conclusory statements in support of his motion.

Class Actions. The Court denied Petitioner's motion for class action where Petitioner offered only a "belief" that a large class of claimants have been denied permanent partial disability benefits pursuant to § 39-71-744, MCA, making their joinder impractical. A "belief" without supporting evidence is an insufficient basis to grant class action status.

¶ 1 Petitioner Lynn Gerber moves this Court to join Derrick Goble as a co-petitioner in this matter. Gerber alleges that he makes this motion pursuant to ARM 24.5.308 and

M. R. Civ. P. 19 and 23.¹ Respondent Montana State Fund (State Fund) opposes Gerber's motion, contending that although Gerber styles his motion as a motion for joinder, he really intends to create a class action, and arguing that he is entitled to neither.² In his reply to State Fund's response, Gerber addresses State Fund's arguments regarding joinder and further asks the Court to certify his case as a class action.³ State Fund then filed a "final brief" in which it responded to the arguments Gerber raised for the first time in his reply brief.⁴

¶ 2 Gerber asks this Court to join Goble as his co-petitioner and to appoint Goble as a co-class representative, contending that both he and Goble are entitled to receipt of permanent partial disability (PPD) benefits under § 39-71-703, MCA, and that State Fund, relying on § 39-71-744, MCA, has refused to pay each of them these benefits during the time they have been incarcerated.⁵ Gerber additionally contends that he and Goble seek these benefits not only for themselves, but for all other similarly situated claimants.⁶ Gerber argues that Goble's joinder would favor judicial economy and is supported by public policy.⁷

¶ 3 State Fund responds that under M. R. Civ. P. 19, joinder is only warranted when the Court cannot accord complete relief among the existing parties, or if the person sought to be joined claims an interest relating to the subject of the action and is so situated that disposing of the action may impair or impede the person's ability to protect that interest or leave an existing party subject to incurring multiple or inconsistent obligations because of the interest. State Fund argues that neither of these conditions exists in the present case.⁸

¶ 4 In short, the arguments presented to the Court regarding Goble's joinder under M. R. Civ. P. 19 amount to: "Do not." "Do too." As the moving party, Gerber has the burden of proof.⁹ Conclusory statements are insufficient to meet this burden.¹⁰

¹ Petitioner's Motion for Joinder and Brief (Opening Brief), Docket Item No. 4.

² State Fund's Response Brief to Petitioner's Motion for Joinder and Brief (Response Brief), Docket Item No. 7.

³ Petitioner's Reply Brief Re: Joinder and Class Action (Reply Brief), Docket Item No. 15.

⁴ State Fund's Final Brief to Petitioner's Motion for Joinder and Brief (Final Brief), Docket Item No. 16.

⁵ Opening Brief at 1.

⁶ Reply Brief at 1.

⁷ Reply Brief at 3.

⁸ Response Brief at 2.

⁹ §§ 26-1-401, -402, MCA.

¹⁰ See, e.g., *Briese v. ACE American Ins. Co.*, 2009 MTWCC 5, ¶ 22, in which I found a conclusory statement inadequate to meet the claimant's burden of proving that his due process rights were violated.

Therefore, I am denying Gerber's motion to join Goble under M. R. Civ. P. 19.

¶ 5 Gerber further argues that this Court should allow his case to move forward as a class action. Relying on M. R. Civ. P. 23, Gerber asserts that he meets the six elements which the Montana Supreme Court has stated it would consider in analyzing a class action request under the Rule. Gerber notes that in *Mathews v. Liberty Northwest Ins. Corp.*, this Court held that although it has no formal rule governing class actions, it looks to the Montana Rules of Civil Procedure to determine whether a class action is appropriate. In so doing, the Court noted that the Montana Supreme Court had previously approved of the Workers' Compensation Court doing so, and that previous case law had established M. R. Civ. P. 23 as the basis for deciding class action requests in this Court.¹¹ In *Mathews*, this Court noted that six elements must be met under M. R. Civ. P. 23 to grant a class action request.¹² Gerber acknowledges that M. R. Civ. P. 23 underwent significant revision subsequent to *Mathews*, but argues that the six elements remain appropriate guidance under the new version of the Rule.¹³

¶ 6 The first element Gerber sets forth is: The class must be so numerous that joinder of all members is impractical.¹⁴ Gerber then asserts that in the present case, the joinder of all members is impractical, explaining, "It is believed that there is a large class of claimants who have been denied § 703 benefits since 1987 pursuant to Mont. Code Ann. § 39-71-744."¹⁵ Gerber asks this Court to grant class action status based on supposition, with no tangible evidence to support his assumptions. Gerber's "belief," without more, is insufficient to meet this criteria.¹⁶ If Gerber wants this Court to seriously consider a motion for class action, he must bring more evidence than he has presented in this instance. I conclude Gerber has not met his burden of proof and deny his motion for class action.

ORDER

¶ 7 Petitioner's motion for joinder is **DENIED**.

¶ 8 Petitioner's motion for class action status is **DENIED**.

¹¹ 2004 MTWCC 55, ¶¶ 14-16.

¹² *Mathews*, ¶ 25. (Citation omitted.)

¹³ Reply Brief at 4, fn. 1.

¹⁴ Reply Brief at 4 (*citing McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993)).

¹⁵ Reply Brief at 5.

¹⁶ See, e.g., *Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 13, ¶ 3: "[T]he UEF's argument basically boils down to Intervenor's tax returns being discoverable because the UEF "believes" they are discoverable. . . . Although it is certainly conceivable that the tax returns may, in fact, be discoverable, I decline to guess as to how that may be."

DATED in Helena, Montana, this 22nd day of June, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Eric Rasmusson
Daniel B. McGregor
Submitted: May 17, 2012