

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 25

WCC No. 2009-2309

KIMBERLY M. KELLER

Petitioner

vs.

LIBERTY NORTHWEST, INCORPORATED

Respondent/Insurer.

ORDER GRANTING LEAVE TO FILE AMENDED RESPONSE TO
PETITION FOR HEARING

Summary: Respondent Liberty Northwest, Incorporated, moved to amend its response to Petitioner Kimberly M. Keller's Petition for Hearing. Liberty's amendment would include a contention that Keller's request to reopen her settlement is barred by the two-year statute of limitations found in § 27-2-203, MCA. Keller opposes Liberty's motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run.

Held: Liberty's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. In this case, Liberty sought to amend its response only a day after it had timely filed its response to Keller's petition. Although Keller characterizes Liberty's proposed statute of limitations defense as "nonviable," that is not readily apparent from the pleadings. Liberty should be allowed to pursue discovery on this matter and determine whether the defense is viable.

Topics:

Pleadings: Amendment. Respondent's motion to amend its response was granted where Respondent sought to amend its response the day after it timely filed its response, and the affirmative defense Respondent sought to add is not indisputably futile.

¶ 1 Respondent Liberty Northwest, Incorporated, (Liberty) moved to amend its response to Petitioner Kimberly M. Keller's (Keller) Petition for Hearing, to include a contention that Keller's request to reopen her settlement is barred by the two-year statute of limitations set forth in § 27-2-203, MCA. Keller opposes Liberty's motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run. For the reasons set forth below, Liberty's motion is granted.

¶ 2 Liberty timely filed its response to Keller's petition on July 9, 2009. The next day, Liberty sought to amend its response to include the following contention:

Petitioner's request to reopen her settlement of indemnity benefits in January 2007 is barred by the two year statute of limitations in § 27-2-203, MCA, and this Court's holding in *Miller v. State Fund*, 1999 MTWCC 21.¹

¶ 3 Keller argues that Liberty's proposed amendment should be rejected as futile because, according to Keller, "This is not a case where the two-year statute of limitations has been exceeded."² Keller points out that § 27-2-203, MCA, requires that an action for relief on the grounds of fraud or mistake must commence within two years of discovery of the facts constituting the fraud or mistake. Keller contends the statute of limitations to reopen her claim could not have begun to run until August or September of 2008, when she discovered the mistake upon which she bases her current claim to reopen her settlement. She argues, therefore, that Liberty's proposed amendment asserting the two-year statute of limitations "is insufficient to state a defense as a matter of law"³ and should be rejected as futile.

¶ 4 Keller is correct that amendments to pleadings may be rejected when the proposed amendment is futile.⁴ In this case, however, I do not see the futility of Liberty's proposed amendment as clearly as Keller does. Keller settled her claim for indemnity benefits in January 2007, approximately two and a half years before she filed her current petition seeking to reopen her settlement. Although Keller is correct that the statute of limitations did not commence running until she discovered the mistake upon which she bases her current petition to reopen her January 2007 settlement, Liberty should not be foreclosed at this stage of the proceedings from exploring the possibility that Keller may have discovered the mistake earlier than she represents.

¹ Liberty's Motion to Amend Response to Petition for Hearing and Supporting Brief at 1.

² Petitioner's Response to Insurer's Motion to Amend Response at 2.

³ *Id.* at 4.

⁴ See *Reier Broadcasting Co., Inc. v. Montana State University-Bozeman*, 2005 MT 240, ¶ 8, 328 Mont. 471, 121 P.3d 549.

¶ 5 This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires.⁵ Liberty timely filed a motion to amend its response. Liberty's statute of limitations defense is not clearly futile and it would be premature to deny Liberty the opportunity to pursue it. Accordingly, Liberty's motion to amend should be granted.

ORDER

¶ 6 Liberty's motion to amend its response to Keller's Petition for Hearing is **GRANTED**.

¶ 7 Liberty shall file its amended response within five days of the date of this Order.

DATED in Helena, Montana, this 12th day of August, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Howard Toole
Larry W. Jones
Submitted: August 3, 2009

⁵ *Wood v. Montana State Fund*, 2007 MTWCC 53, ¶ 3 (citing *Higgins v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 31, ¶ 6).