

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 25

WCC No. 2005-1471

DAN LAPIER

Petitioner

vs.

MONTANA STATE FUND

Respondent

and

ASSOCIATED LOGGERS EXCHANGE

Third-Party Respondent.

ORDER GRANTING MOTION TO JOIN THIRD-PARTY RESPONDENT

Summary: Respondent moved to join another insurer as a third-party respondent because Petitioner worked for an employer insured by the proposed third party, Associated Loggers Exchange (ALE), after Petitioner worked for Respondent's insured. Petitioner has filed an occupational disease claim. Respondent alleges that ALE is liable for Petitioner's occupational disease pursuant to § 39-72-303(1), MCA (2003) – the last injurious exposure rule. Petitioner objects to the joining of the third party as untimely. ALE objects on the grounds that Petitioner's claim against it, if any, would be barred by the statute of limitations. Alternatively, ALE argues that it could not be subject to the last injurious exposure rule because Petitioner did not reach maximum medical improvement before working for ALE's insured.

Held: While the proposed third-party respondent may have valid defenses in this case, those defenses cannot be resolved in a motion to join, but must be decided on their merits. Furthermore, the alleged untimeliness of Respondent's motion to join was caused by Petitioner's delayed response to Respondent's discovery request. Motion to join is granted.

Topics:

Procedure: Joining Third Parties. Where an insurer seeks to join a third-party respondent, and that third party resists joinder, setting forth various defenses which may ultimately absolve it of liability, it is nonetheless proper to join that third party so that these defenses may be resolved on their merits.

¶1 On March 24, 2006, Montana State Fund (MSF) moved to join Associated Loggers Exchange (ALE), the insurer for B&B Logging, as a third party in this action. MSF argues that ALE should be joined because Petitioner worked for B&B Logging after Petitioner's employment with MSF's insured ended. MSF argues that, pursuant to § 39-72-303, MCA (2003), B&B Logging was the employer of last injurious exposure and, therefore, its insurer is a proper third-party respondent.¹

FACTUAL BACKGROUND

¶2 The following facts are taken from the briefs and pleadings with respect to MSF's motion. They are unverified and adopted only for purposes of deciding the pending motion.

¶2a Petitioner filed an occupational disease claim with his employer, Bearmouth Logging, on September 13, 2003.² He continued to work for Bearmouth Logging until November 29, 2003.³

¶2b Petitioner worked for B&B Logging, insured by ALE, from May 4, 2004 through October 13, 2004.⁴ He has been unemployed since leaving B&B Logging.⁵

¶2c On November 18, 2005, Petitioner filed a Petition for Hearing with this Court, claiming he suffers from an occupational disease arising out of and in the course of his employment with Bearmouth Logging.⁶

¹ Montana State Fund's Motion to Join a Third Party.

² Petition for Hearing, ¶ 1.

³ Occupational Disease Evaluator's Report, attached as Exhibit D to Montana State Fund's Brief in Support of Motion to Join Third Party at 26, 28.

⁴ Associated Loggers Exchange's Objection to State Fund's Motion to Join a Third Party, ¶ 5.

⁵ Petitioner's list of employers, attached as Exhibit D to Montana State Fund's Brief in Support of Motion to Join Third Party at 2-3.

⁶ Petition for Hearing, ¶ 1.

¶2d MSF responded to the Petition for Hearing on December 16, 2005.⁷

¶2e On December 30, 2005, MSF served notices of depositions of Petitioner and two doctors, and further served Petitioner with written discovery.⁸

¶2f On January 5, 2006, the noticed depositions were cancelled at Petitioner's request.⁹ On March 13, 2006, Petitioner provided a summary of his prior and subsequent employment, and a narrative alleging his occupational disease was aggravated while he was employed by B&B Logging.¹⁰

DISCUSSION

¶3 Petitioner informed MSF that he worked at B&B Logging subsequent to his employment with Bearmouth Logging. In a narrative which he provided to MSF on March 10, 2006, Petitioner stated that he was hired as a skidder operator. He was soon asked to perform sawyer work, however, regarding which Petitioner stated:

[O]wner became very upset when I told him I wasn't able to do that kind of work related often having decreased to no feeling in my hands, tingling, and pain... As a skidder operator I was still experiencing the symptoms of loss of feeling, tingling and moderate to severe pain in my hands, arms, shoulder and lower back but I could & did stop to rest a few minutes at a time to lessen the symptoms but eventually, not even this remedy helped. As a result I quit this job and have been unable to work since.¹¹

¶4 MSF argues that based on this statement, MSF believes exposure during Petitioner's employment with B&B Logging caused and aggravated Petitioner's occupational disease. Therefore, MSF argues, B&B Logging is the employer of last injurious exposure. Consequently, as B&B Logging's insurer, ALE is a proper party to this case.¹²

⁷ Montana State Fund's Response to Petition for Hearing.

⁸ Notice of Deposition of Daniel LaPier; Notice of Deposition of Dr. Lennard Wilson; Notice of Deposition of Dr. Catherine Capps.

⁹ Notice of Cancellation of Deposition of Daniel LaPier; Notice of Cancellation of Deposition of Dr. Lennard Wilson; Notice of Cancellation of Deposition of Dr. Catherine Capps.

¹⁰ Cover letter and attachment thereto with Petitioner's list of employers, attached as Exhibit D to Montana State Fund's Brief in Support of Motion to Join Third Party at 1-3.

¹¹ Petitioner's list of employers, attached as Exhibit D to Montana State Fund's Brief in Support of Motion to Join Third Party at 2-3.

¹² Montana State Fund's Brief in Support of Motion to Join Third Party at 2.

¶5 Section 39-72-303(1), MCA (2003), provides, “Where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.” MSF further points out that in *Fleming*, this Court stated that as long as there is some exposure of a kind which could have caused the occupational disease, the last insurer at risk is liable for all disability from that disease.¹³

¶6 MSF further argues that this Court has previously required joinder of third parties to promote judicial economy by reducing the possibility of multiple actions, promoting justice by reducing the possibility of inconsistent adjudications, and where absence of a party will prevent complete relief for the parties involved in the action.¹⁴ Thus, MSF urges the Court to join ALE as a third-party respondent as ALE is liable for Petitioner’s claim under the last injurious exposure rule.

¶7 Petitioner opposes MSF’s motion, stating simply, “This motion is late. It certainly could have been filed earlier but was not.”¹⁵ MSF replies that Petitioner has failed to allege any prejudice in the timing of the filing, and further alleges that the timing of the motion was due to the circumstances created by Petitioner when Petitioner cancelled his deposition and failed to respond to written discovery until March 13, 2006. MSF further notes that it is still waiting for a response to its March 14, 2006, letter to Petitioner’s attorney requesting deposition dates.¹⁶

¶8 ALE has also responded, objecting to MSF’s motion to join ALE as a third-party respondent. ALE alleges that Petitioner’s employment with B&B Logging did not cause Petitioner’s carpal tunnel syndrome or upper extremity problems, and that Petitioner has not given B&B Logging notice of an occupational disease, nor filed a claim with ALE. ALE further alleges that any such claims would now be untimely as the statute of limitations has run, and thus ALE should not be joined as a party as untimeliness is an absolute defense to any claim against ALE Petitioner may have had.¹⁷

¶9 ALE further argues that it cannot be held liable under the last injurious exposure rule because MSF’s denial of Petitioner’s claim prevented Petitioner from receiving medical treatment prior to his employment at B&B Logging. Therefore, ALE contends that Petitioner was never placed at maximum medical improvement (MMI) or assigned an impairment rating

¹³ *Fleming v. International Paper Co.*, 2005 MTWCC 34, ¶ 51 (citing 9 *Arthur Larson and Lex K. Larson, Larson’s Workers’ Compensation Law*, § 153.02[7][a] at 153 -19-20).

¹⁴ See, e.g., *Johnson v. MMIA*, 1998 MTWCC 50; *American Alternative Ins. Group v. Sorenson*, 1999 MTWCC 79.

¹⁵ Response to State Fund’s Motion to Join a Third Party at 1.

¹⁶ Montana State Fund’s Reply Brief to Petitioner’s Response to State Fund’s Motion to Join a Third Party at 1-2.

¹⁷ Associated Loggers Exchange’s Objection to State Fund’s Motion to Join a Third Party, ¶¶ 1-4.

until after he left B&B Logging. ALE argues attainment of MMI from the aggravation which allegedly occurred during Petitioner's employment with Bearmouth Logging is a prerequisite to passing liability to ALE as a subsequent insurer.¹⁸

¶10 Although ALE may have defenses to liability, MSF replies, ALE should nonetheless be joined as a party in order to allow the Court to resolve these factual and legal issues. MSF argues that whether ALE may be relieved of liability due to the statute of limitations, or whether Petitioner did not reach MMI prior to being employed by B&B Logging, are questions which must be resolved by this Court and resolution of these questions are best obtained with ALE joined as a party.¹⁹ MSF further points out that this Court has previously held that while an insurer may be correct in asserting that a claim against it is barred, such contention is more appropriately resolved on the merits *after* the insurer is made a party as the merits of its defense cannot be considered when determining whether it should be joined.²⁰ Ultimately, MSF urges this Court to consider the merits of ALE's position in light of the entire record developed for trial before determining whether MSF can properly bring a last injurious exposure defense.²¹

¶11 The Court finds MSF's arguments persuasive. While ALE's defenses may ultimately relieve it of liability in this case, these defenses must be resolved on their merits after ALE becomes a party.

ORDER

¶12 Respondent's motion for joinder is **GRANTED**.

¶13 The caption of this matter is changed to reflect Associated Loggers Exchange as a third-party respondent.

¶14 Associated Loggers Exchange is ordered to file a response to the petition within 20 days of the date of this Order.

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¹⁸ *Id.*, ¶¶ 5-6.

¹⁹ Montana State Fund's Reply Brief to Associated Loggers Exchange's Objections to Joinder at 1.

²⁰ *American Alternative Ins. Group v. Sorenson*, 1999 MTWCC 79, ¶ 8.

²¹ Montana State Fund's Reply Brief to Associated Loggers Exchange's Objections to Joinder at 4.

DATED in Helena, Montana, this 7th day of July, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Pyfer
Leo S. Ward
James R. Hintz
Submitted: May 2, 2006