

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 44

WCC No. 2004-1135

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**KAREN LANZ**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Respondent/Insurer**

**and**

**BOZEMAN DEACONESS HEALTH SERVICES**

**Employer.**

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DECISION AND JUDGMENT DISMISSING  
BOZEMAN DEACONESS HEALTH SERVICES

**Summary:** Pursuant to the employment preference provision of the Workers' Compensation Act, § 39-71-317, MCA (1999), the petitioner brought an action for reinstatement of employment and back pay, naming her employer's workers' compensation insurer as the sole respondent to her claim. Thereafter, with leave of Court, she filed an amended petition naming her employer. The employer moved to dismiss on the ground that the amended petition is time barred.

**Held:** The amended petition is time barred under § 27-2-211(1)(c), MCA (1999), which requires that any action based on a liability created by statute be commenced within two years. The amended petition was filed more than two years after the preference period had ended. The amended petition does not relate back to the filing date for the original petition since no fictitious respondents were named and the claimant proffers no evidence satisfying the criteria of Rule 15(c), Mont. R. Civ. P.

## Topics:

**Limitations Periods: Employment Preference.** The two-year limitations period for actions based on liability created by statute, § 27-2-211(1)(c), MCA (1999), applies to actions under the employment preference provision of the Workers' Compensation Act, § 39-71-317, MCA (1999).

**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 27-2-211(1)(c), MCA (1999).** The two-year limitations period for actions based on liability created by statute, § 27-2-211(1)(c), MCA (1999), applies to actions under the employment preference provision of the Workers' Compensation Act, § 39-71-317, MCA (1999).

**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-317, MCA (1999).** The two-year limitations period for actions based on liability created by statute, § 27-2-211(1)(c), MCA (1999), applies to actions under the employment preference provision of the Workers' Compensation Act, § 39-71-317, MCA (1999).

**Pleading: Amendments.** An amended petition adding a new party does not relate back to the original petition for statute of limitations purposes where there is no showing that the new party was, within the limitations period, aware of the filing of the petition and knew, or should have known, that the petitioner had made a mistake concerning its identity, or where the petition failed to name fictitious respondents whose true identities were unknown. Rule 15(c), Mont. R. Civ. P. and § 25-5-103, MCA (1999).

**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 25-5-103, MCA (1999).** An amended petition adding a new party does not relate back to the original petition for statute of limitations purposes where there is no showing that the new party was, within the limitations period, aware of the filing of the petition and knew, or should have known, that the petitioner had made a mistake concerning its identity, or where the petition failed to name fictitious respondents whose true identities were unknown. Rule 15(c), Mont. R. Civ. P. and § 25-5-103, MCA (1999).

**Procedure: Rules of Procedure.** Where the rules of the Workers' Compensation Court are silent, the Court may look to the Montana Rules of Civil Procedure for guidance. ARM 24.5.352.

**Constitutions, Statutes, Rules, and Regulations: Workers' Compensation Court Rules: ARM 24.5.352.** Where the rules of the Workers' Compensation Court are silent, the Court may look to the Montana Rules of Civil Procedure for guidance. ARM 24.5.352.

**Constitutions, Statutes, Rules, and Regulations: Rules of Civil Procedure: Rule 15(c), Mont. R. Civ. P.** An amended petition adding a new party does not relate back to the original petition for statute of limitations purposes where there is no showing that the new party was, within the limitations period, aware of the filing of the petition and knew, or should have known, that the petitioner had made a mistake concerning its identity, or where the petition failed to name fictitious respondents whose true identities were unknown. Rule 15(c), Mont. R. Civ. P. and § 25-5-103, MCA (1999).

¶1 The matter before the Court is a motion filed by Bozeman Deaconess Health Services requesting the Court to reconsider its order denying its motion to dismiss. Finding good cause for reconsideration, the motion is granted.

#### Background

¶2 The petitioner (claimant) in this case filed a Petition for Hearing on September 28, 2004. In that petition, she alleged that on November 8, 2000, while working for Bozeman Deaconess Health Services (Bozeman Deaconess), she was found to have suffered a herniated disk at the L5-S1 level as a result of work for Bozeman Deaconess during the summer of 2000. The Court has generously construed her Petition for Hearing and Amended Petition for Hearing as alternatively alleging either an occupational disease arising over the summer of 2000 or an injury occurring on November 8, 2000. *Lanz v. Liberty Northwest Ins. Corp. and Bozeman Deaconess Health Services*, 2005 MTWCC 22, ¶ 10.

¶3 The claimant alleged that she was entitled to a hiring preference and that Bozeman Deaconess failed to honor that preference by refusing to hire her for a position for which she was qualified. She sought judgment requiring Bozeman Deaconess to return her to her time-of-injury job and for back pay and benefits. In the alternative, she asserted she is permanently totally disabled and entitled to permanent total disability benefits.

¶4 The original Petition for Hearing named Bozeman Deaconess' insurer – Liberty Northwest Insurance Corporation (Liberty) – as the sole respondent. It did not name Bozeman Deaconess, nor did it name any fictitious respondents.

¶5 Liberty responded to the petition with a motion to dismiss and for judgment on the pleadings. In its motion, it pointed out that it was not a proper party to any claim arising out

of the employment preference statute and that the proper party is the claimant's employer. Apparently recognizing her error, on November 23, 2004, the claimant moved for leave to file an amended petition and tendered an Amended Petition for Hearing naming, for the first time, Bozeman Deaconess as the respondent to her employment preference claim. On January 18, 2005, I granted the motion to amend. In my order I deemed the Amended Petition for Hearing as filed November 23, 2004, the day that it was lodged with the Court.

¶6 Bozeman Deaconess was then served with the amended petition. It filed a motion to dismiss urging that the claim against it was time barred. I denied the motion because the specific statutes of limitation cited by Bozeman Deaconess were inapplicable. 2005 MTWCC 18. Bozeman Deaconess then filed a motion for reconsideration in which it has tendered the correct statute of limitations applicable to the claim. Since the timeliness of the claimant's amended petition turns on whether that amended petition relates back to the date the original petition was filed, I requested the parties to brief that question. Those briefs have been filed and the motion is now ripe for decision.

#### Discussion

¶7 The petition alleges that Bozeman Deaconess failed to provide the claimant with an employment preference.<sup>1</sup> The preference is found in § 39-71-317, MCA (1999), which provides in relevant part:

(2) When an injured worker is capable of returning to work within 2 years from the date of injury and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker's physical condition and vocational abilities.

(3) This preference applies only to employment with the employer for whom the employee was working at the time the injury occurred.

Relying upon *Lueck v. United Parcel Serv.*, 258 Mont. 2, 851 P.2d 1041 (1993), I have previously determined that the preference does not apply to occupational disease claims; however, I construed the claimant's petition and amended petition as alleging in the alternative that she suffered a work-related injury. 2005 MTWCC 22.

¶8 Assuming that the claimant suffered an injury, petitioner alleges that it occurred on November 8, 2000. Thus, the statutory employment preference expired two years later,

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<sup>1</sup>The Workers' Compensation Court has exclusive jurisdiction over disputes concerning the employment preference. § 39-71-317(4), MCA (1999).

or on November 8, 2002. Any statute of limitations therefore commenced running on November 8, 2002.

¶9 The applicable statute of limitations, which has now been identified by Bozeman Deaconess in its motion to reconsider, is section 27-2-211(1)(c), MCA (1999). The section provides a two-year limitation for any “liability created by statute other than: (i) a penalty or forfeiture; or (ii) a statutory debt created by the payment of public assistance.” The phrase “liability created by statute” means any “liability which would not exist but for the statute . . .” *Royal Ins. Co. v. Roadarmel*, 2000 MT 259, ¶¶ 17, 29, 301 Mont. 508, 11 P.3d 105. The alleged liability of Bozeman Deaconess arises under section 39-71-317, MCA (1999), and is therefore a “liability created by statute.” Thus, the claim against it is time barred unless the amended petition, which was filed more than two years after November 8, 2002, relates back to the claimant’s original petition, which was filed less than two years after that date.

¶10 This Court has no rule regarding the relating back of amendments to pleadings. However, Rule 24.5.352 of this Court provides that “[i]f no express provision is made in these rules regarding a matter of procedure, the court will be guided, where appropriate, by considerations and procedures set forth in the Mont. R. Civ. P.” Rule 15(c) of the Montana Rules of Civil Procedure does address the matter and the Court will therefore be guided by it. Rule 15(c) provides:

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

¶11 Under Rule 15(c), lacking proof of the fact that Bozeman Deaconess received notice *within the limitations period* of the filing of the original petition and knew or should have known that the claimant was mistaken concerning the identity of the proper party, the amended petition does not relate back. *Keller v. Stembridge Gun Rentals*, 221 Mont. 352, 354, 719 P.2d 764, 765 (1986). The claimant has offered no evidence which would satisfy these criteria. Moreover, the claimant could not have been operating under a mistake concerning the identity of the proper party as her original petition identifies her employer.

Thus, she knew the identity of her employer and mistakenly chose to seek relief against its insurer. Rule 15(c) does not contemplate this sort of mistake.

¶12 There is another circumstance where an amended petition naming a new party relates back; that is where the original petition names fictitious respondents whose actual identities are unknown to the petitioner and the petitioner later identifies the proper party. See *Molina v. Panco Constr., Inc.*, 2002 MT 136, 310 Mont. 185, 49 P.3d 570 (citing § 25-5-103, MCA). The claimant in this case did not name any fictitious respondents and in any event knew the identity of her employer. Thus, the rule is inapplicable.

¶13 Since the amended petition does not relate back to the original petition, the date of its filing – November 23, 2004, must be used for purposes of section 27-2-211(1)(c), MCA (1999). Under that section, the petition is time barred and must therefore be dismissed.

#### ORDER AND JUDGMENT

¶14 IT IS HEREBY ORDERED AND ADJUDGED that the petition against Bozeman Deaconess Health Services be and hereby is **dismissed with prejudice**.

DATED in Helena, Montana, this 3<sup>rd</sup> day of August, 2005.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Geoffrey C. Angel  
Mr. Larry W. Jones  
Ms. Lisa A. Levert  
Submitted: June 14, 2005