

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 39

WCC No. 2010-2568

DARREL MURPHY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

**ORDER GRANTING RESPONDENT'S MOTION TO AMEND RESPONSE TO
PETITION FOR TRIAL**

Summary: Respondent asks for leave to amend its response to Petitioner's petition for trial to add a contention that Petitioner did not notify his employer of his injury within 30 days of the industrial accident. Petitioner opposes Respondent's motion, arguing that Respondent has waived its right to assert this defense.

Held: Respondent's motion to amend is granted. Petitioner's contention that Respondent cannot successfully defend its claim on these particular grounds is not a basis for precluding the amendment.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 15. This Court follows M.R.Civ.P. 15(a) in determining whether to permit parties to amend pleadings. Petitioner objected to Respondent's motion to amend its response to add a contention that Petitioner failed to meet the time requirements of § 39-71-603, MCA, on the grounds that Respondent cannot prevail on this defense. The likelihood of success of defending a claim on particular grounds is not a basis for precluding an amendment otherwise permissible under M.R.Civ.P. 15(a), and Petitioner's argument as to the merits of Respondent's defense is premature.

Pleading: Amendments. This Court follows M.R.Civ.P. 15(a) in determining whether to permit parties to amend pleadings. Petitioner objected to Respondent's motion to amend its response to add a contention that Petitioner failed to meet the time requirements of § 39-71-603, MCA, on the grounds that Respondent cannot prevail on this defense. The likelihood of success of defending a claim on particular grounds is not a basis for precluding an amendment otherwise permissible under M.R.Civ.P. 15(a), and Petitioner's argument as to the merits of Respondent's defense is premature.

¶ 1 Respondent Montana State Fund moves the Court for leave to amend its response to Petitioner Darrel Murphy's petition for trial to include the following contention: "Petitioner did not meet the requirements of section 39-71-603, MCA[,] which requires notice of the injury to the insurer or employer within 30 days after the claimed accident causing the injury."¹ Murphy opposes State Fund's motion, arguing that State Fund waived its right to defend its denial on the basis of the 30-day notice requirement of § 39-71-603, MCA. Murphy alleges that State Fund denied his claim without any investigation. Murphy argues that State Fund had a duty to investigate his claim and failed to do so, and that State Fund cannot now defend its denial on grounds not previously stated.²

¶ 2 This Court has followed M.R.Civ.P. 15(a) in determining whether to permit parties to amend pleadings.³ Under that Rule, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may amend at any time within 20 days after it is served. Otherwise, the party may amend its pleading only by leave of court or by written consent of the adverse party, with leave freely given when justice so requires.

¶ 3 Recently, in *Flynn v. Montana State Fund*, Petitioners moved to amend their petition to include claims for penalties and attorney fees. Respondents objected, arguing that they believed the evidence would demonstrate that they had not acted unreasonably and therefore could not be subject to penalties or attorney fees. I held that Respondents' arguments as to the merits of the proposed amendment were premature and did not provide a basis for denying the requested amendment.⁴

¹ Motion to Amend Response and Brief in Support at 2, Docket Item No. 13.

² Petitioner's Brief Opposing Respondent's Motion to Amend Response, Docket Item No. 15.

³ *Higgins v. Liberty Northwest Ins. Co.*, 2004 MTWCC 31, ¶ 6.

⁴ *Flynn*, 2010 MTWCC 26, ¶ 3.

¶ 4 *Flynn* is analogous to the present case. Murphy's arguments go to the merits of State Fund's proposed amendment and do not provide a basis for denying the requested amendment. The likelihood that State Fund may ultimately succeed in defending against Murphy's claim on these grounds is not a basis for precluding the amendment. Murphy's argument as to the merits of State Fund's defense is premature and do not provide a basis for denying the requested amendment at this stage of the proceedings. State Fund may amend its response to Murphy's petition for trial.

ORDER

¶ 5 Respondent's motion to amend is **GRANTED**.

¶ 6 The First Amended Response to Petition for Hearing received with Respondent's Motion to Amend and Brief in Support shall be filed as of the date of this Order.

DATED in Helena, Montana, this 23rd day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Thomas E. Martello
Submitted: December 22, 2010