

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 11

WCC No. 2014-3490

PHILLIP SPENCER

Petitioner

vs.

MONTANA SCHOOLS GROUP INS. AUTHORITY

Respondent/Insurer.

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

Summary: Respondent moved to amend its response to the Petition for Hearing to raise a statute of limitations defense under § 39-71-2905(2), MCA, which states, "A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." Petitioner argues that Respondent should not be allowed to amend on the grounds that Respondent's motion is untimely and that it would be unduly prejudicial to allow Respondent to raise another statute of limitations defense because he has spent "thousands" of dollars in expert witness fees.

Held: Respondent's motion to amend is granted. This Court follows M.R.Civ.P. 15(a), which provides that leave to amend a pleading is to be freely given when justice so requires. Respondent's motion to amend was timely under the Scheduling Order. Since cases in this Court are heard on an expedited basis when compared to civil actions in Montana's district courts, amendments to pleadings will often occur shortly before trial. After considering the Petitioner's objections, the amendment is not unduly prejudicial because Petitioner was aware of the statute of limitations defense under § 39-71-2905(2), MCA, and was on notice that there was another statute of limitations defense affirmatively pled in the response to the petition. Nevertheless, he proceeded forward with his case.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure: Rule 15. A motion to amend the response to the

Petition for Hearing was not untimely when it was filed less than three months after the petition was filed and within the time allowed by the Scheduling Order.

Pleadings: Amendments. A motion to amend the response to the Petition for Hearing was not untimely when it was filed less than three months after the petition was filed and within the time allowed by the Scheduling Order.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure: Rule 15. Since permitting amendments to the pleadings is the general rule and denying leave to amend is the exception, Petitioner was not unduly prejudiced by allowing Respondent to amend its pleadings to add a second statute of limitations defense when Petitioner knew of both affirmative defenses yet went ahead and incurred experts' fees anyway; and Respondent's motion to amend was filed timely in accordance with the Scheduling Order.

Pleadings: Amendments. Since permitting amendments to the pleadings is the general rule and denying leave to amend is the exception, Petitioner was not unduly prejudiced by allowing Respondent to amend its pleadings to add a second statute of limitations defense when Petitioner knew of both affirmative defenses yet went ahead and incurred experts' fees anyway; and Respondent's motion to amend was filed timely in accordance with the Scheduling Order.

¶ 1 Respondent Montana Schools Group Insurance Authority (MSGIA) moves to amend its response to the petition for hearing to include a statute of limitations defense under § 39-71-2905(2), MCA, which states, "A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." The motion,¹ with supporting brief,² was timely filed under the Scheduling Order³ on April 10, 2015, as was MSGIA's motion for summary judgment⁴ with supporting brief.⁵

¹ Montana Schools Group Insurance Authority's Motion to Amend Response to Petition, Docket Item No. 13.

² Montana Schools Group Insurance Authority's Brief in Support of Motion to Amend Response to Petition, Docket Item No. 14.

³ Scheduling Order, Docket Item No. 2.

⁴ Montana Schools Group Insurance Authority's Motion for Summary Judgment, Docket Item No. 16.

⁵ Montana Schools Group Insurance Authority's Brief in Support of Motion for Summary Judgment (MSGIA's Summary Judgment Brief), Docket Item No. 17.

¶ 2 When Spencer did not timely file a brief in opposition to MSGIA's motion to amend, this Court granted it on April 24, 2015, pursuant to ARM 24.5.316(4), which states in pertinent part, "Failure of the adverse party to timely file a response brief may be deemed an admission that the motion is well-taken."⁶

¶ 3 On April 27, 2015, Spencer moved the Court to reconsider its Order Granting Motion Pursuant to ARM 24.5.316(4).⁷ Upon due consideration of the facts and circumstances of this case, the Court concluded there was good cause to grant Petitioner's Motion for Reconsideration and withdrew the Order pursuant to ARM 24.5.337 and 24.5.349.⁸

¶ 4 On April 27, 2015, Spencer filed a brief opposing MSGIA's motion to amend.⁹ Spencer argues that MSGIA's motion to amend is untimely and that it would be unduly prejudicial to allow MSGIA to amend its response to the petition so close to trial.

Facts

¶ 5 On May 30, 2012, Spencer filed his First Report of Injury or Occupational Disease with the Department of Labor & Industry.¹⁰

¶ 6 On June 28, 2012, MSGIA sent Spencer's attorney a letter stating, *inter alia*, "At this time, we do not have sufficient information to accept liability for Mr. Spencer's claim as an occupational disease and therefore must respectfully deny liability for Mr. Spencer's above referenced claim as an occupational disease as well."¹¹

¶ 7 Spencer petitioned for mediation required by §§ 39-71-2401, *et seq.*, MCA, on June 24, 2014, on the issue of whether he had a compensable occupational disease.¹² The mediator's recommendation was issued on August 12, 2014, and mailed to the parties on August 13, 2014.¹³

⁶ Order Granting Motion Pursuant to ARM 24.5.316(4), Docket Item No. 24.

⁷ Petitioner's Motion for Reconsideration, Docket Item No. 29.

⁸ Order Granting Petitioner's Motion for Reconsideration, Docket Item No. 33.

⁹ Petitioner's Response to Respondent's Motion to Amend Response to Petition, Docket Item No. 27.

¹⁰ Spencer Dep., Ex. 1 (attached to MSGIA's Summary Judgment Brief).

¹¹ MSGIA's Summary Judgment Brief, Ex. 1.

¹² MSGIA's Summary Judgment Brief, Ex. 3.

¹³ MSGIA's Summary Judgment Brief, Ex. 4 at 1-2.

¶ 8 Spencer filed his Petition for Hearing on December 11, 2014, alleging that he suffers from an occupational disease resulting from his employment with the Libby School District in Lincoln County, Montana from 1998 to March 2011.¹⁴

¶ 9 This Court issued its standard Scheduling Order on December 11, 2014, which provided, *inter alia*, that the deadline for a motion to amend pleadings and for summary ruling was April 10, 2015.¹⁵ On that date, MSGIA filed its motion for summary judgment and to amend its response to the petition.

¶ 10 In MSGIA's response to the Petition for Hearing, it contended, *inter alia*: "Petitioner is also not entitled to occupational disease benefits because he failed to file his claim within one year from the date that he knew or should have known that his alleged condition resulted from an occupational disease."¹⁶

Law and Analysis

¶ 11 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect on Spencer's last day of employment and consequently, his alleged last injurious exposure.¹⁷

¶ 12 ARM 24.5.302(1)(a) requires a respondent to file a response to a Petition for Hearing that sets forth "a short, plain statement of the respondent's contentions." This Court has ruled, "While the Workers' Compensation Court has its own rules of procedure, its rules require a respondent to set out its contentions in its response, ARM 24.5.302(1)(a), hence the Court will not consider a statute of limitations defense if not listed in the contentions."¹⁸

¶ 13 This ruling comports with M.R.Civ.P. 8(c)(1), which provides that a party must affirmatively state any affirmative defense, including statute of limitations. If a defendant does not set forth an affirmative defense in its responsive pleading, it is deemed waived.¹⁹ However, the Montana Supreme Court has held, "Rule 8(c) is not absolute . .

¹⁴ Petition for Hearing at 1-2, Docket Item No. 1.

¹⁵ Scheduling Order at 2, Docket Item No. 2.

¹⁶ Montana Schools Group Insurance Authority's Response to Petition for Hearing (Response to Petition) at 1-2, Docket Item No. 4.

¹⁷ *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

¹⁸ *Kelly v. Hartford Accident & Indem. Co.*, 2000 MTWCC 50, ¶ 27, n.1.

¹⁹ *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 31, 341 Mont. 345, 178 P.3d 81 (citation omitted). See also *Kratovil v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 38, ¶ 3 (citing *Kelly*, 2000 MTWCC 50).

. as the court retains discretion to allow a defendant to amend pursuant to the terms of M.R.Civ.P. 15”²⁰

¶ 14 This Court follows M.R.Civ.P. 15(a) in determining whether to permit parties to amend pleadings.²¹ M.R.Civ.P. 15(a)(2) provides that if 21 days has elapsed since a pleading was served, the party “may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”

¶ 15 The Montana Supreme Court has recently explained that M.R.Civ.P. 15(a) “favors allowing amendments.”²² Indeed, it has “interpreted the Rule liberally, allowing amendment of pleadings as the general rule and denying leave to amend as the exception.”²³ “The proposed amendment should be permitted, in keeping with the policy that leave to amend ‘shall be freely given when justice so requires,’ unless: (1) the ‘motion causes undue delay, is made in bad faith, is based upon a dilatory motive on the part of the movant, or is futile,’ or (2) ‘the party opposing the amendment would incur substantial prejudice as a result of the amendment.’”²⁴

¶ 16 Relying upon *Bitterroot International Systems, Ltd. v. Western Star Trucks, Inc.*, Spencer argues that this Court should deny MSGIA’s motion because it is untimely, as it was filed four weeks before trial. Spencer also argues that he will be unduly prejudiced, as he has “incurred thousands of dollars in expenses hiring two experts and preparing two expert reports.” Spencer maintains, “If a statute of limitations defense had been raised in the response, the Petitioner would have had the opportunity to avoid those expenses.”²⁵

¶ 17 This Court disagrees with Spencer’s claim that MSGIA’s motion was untimely. MSGIA moved to amend its response to the Petition for Hearing within the time this Court set to file motions to amend pleadings. This Court is not aware of any case holding that a motion to amend a pleading within the deadline set forth in this Court’s

²⁰ *Bitterroot Int’l Sys., Ltd. v. W. Star Trucks, Inc.*, 2007 MT 48, ¶ 49, 336 Mont. 145, 153 P.3d 627 (citation omitted).

²¹ See, e.g., *Murphy v. Montana State Fund*, 2010 MTWCC 39, ¶ 2 (citation omitted).

²² *Seamster v. Musselshell Cnty. Sheriff’s Office*, 2014 MT 84, ¶ 14, 374 Mont. 358, 321 P.3d 829 (quotation marks omitted) (citations omitted).

²³ *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991) (citation omitted). See also *Ins. Co. of State of Penn. v. State Comp. Ins. Fund*, 2000 MTWCC 26, ¶ 11 (*In re Berquist*) (citation omitted) (“Generally speaking, the authority to allow amendments is reposed in the sound discretion of the trial court. And it is the rule to allow, and the exception to deny, amendments.”).

²⁴ *Stevens v. Novartis Pharm. Corp.*, 2010 MT 282, ¶ 64, 358 Mont. 474, 247 P.3d 244 (citation omitted).

²⁵ Petitioner’s Response to Respondent’s Motion to Amend Response to Petition at 3.

Scheduling Order could be deemed untimely. Moreover, unlike in *Bitterroot International Systems*, the delay in this case was not extreme when measured from the beginning of the case, as MSGIA moved to amend less than three months after Spencer filed his Petition for Hearing.²⁶ In a case where this Court allowed a claimant to amend his petition at the pretrial conference to add a new claim, this Court recognized that since proceedings in this Court are on an expedited basis, motions to amend pleadings will often be made shortly before trial.²⁷

¶ 18 Nor does this Court agree that Spencer will be unduly prejudiced if MSGIA is allowed to amend its response. Spencer argues that MSGIA has known for some time of the facts underlying its statute of limitations defense under § 39-71-2905(2), MCA. However, Spencer has also known of those same facts. Although Spencer argues that he could have avoided incurring expert witness fees, he does not explain, and the Court does not know, how he would have avoided those expenses. The deadline for expert disclosure was the same as the deadline to move for summary judgment. Thus, Spencer's experts would have been preparing their reports as the case progressed. There is no authority that a party can block its opponent's attempt to amend a pleading by incurring costs before the deadline to amend pleadings. Although MSGIA included in its response to the Petition for Hearing the affirmative defense of the statute of limitations "because [Spencer] failed to file his claim within one year from the date that he knew or should have known that his alleged condition resulted from an occupational disease," as required by § 39-71-601(3), MCA,²⁸ Spencer was still willing to pursue this case. Given that Spencer appears to concede that his claim is time-barred under § 39-71-2905(2), MCA, he may well have wasted money on liability experts. However, that is the risk he took when he filed this case beyond the deadline.

¶ 19 This Court does not see any evidence that would make this case fall under the exception to the general rule that an amendment to the pleadings shall be permitted.

///

²⁶ *Bitterroot Int'l Sys.*, ¶¶ 47-54 (holding that the defendant's motion to amend its answer to add an affirmative defense of statute of frauds nearly five years after plaintiff had filed its amended complaint and three months before trial was untimely).

²⁷ *Higgins v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 31, ¶ 6.

²⁸ Response to Petition at 1-2.

ORDER

¶ 20 Respondent's motion to amend its response to the Petition for Hearing is **granted.**

DATED this 10th day of June, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder/Dustin Leftridge
Leo S. Ward

Submitted: May 7, 2015

Order Granting Respondent's Motion to Amend Response to Petition - Page 7