

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 56

WCC No. 9806-7992

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner/Insurer for

BOYNE, USA

Employer

vs.

SHANA BEHR

Respondent.

ORDER DISMISSING PETITION

Summary: Insurer filed a petition seeking a determination whether Shana Behr may waive her entitlement to workers' compensation benefits and whether she could be ordered to undergo an independent medical examination. The petition followed Behr's filing of a tort action against Liberty's insured. Behr filed a response, stating she is not seeking workers' compensation benefits and that if she has made any claim for compensation, she withdraws the claim and waives any entitlement to benefits under the WCA.

Held: Insurer's petition dismissed. An insurer cannot use a declaratory judgment action to force a claimant to litigate a potential claim for benefits. Second, in light of Behr's express waiver of any claim for workers' compensation benefits, no case or controversy exists between the parties, i.e. between the insurer and Behr. Finally, insofar as a real controversy may exist concerning the effect of Behr's waiver upon her tort claim against Liberty's insured, the insurer is without standing to litigate that controversy because, as a workers' compensation insurer, it has no personal stake in the outcome. The Court hearing the tort claim is the forum to handle an argument over exclusivity of the WC remedy.

Topics:

Declaratory Judgment: Pre-emptive Strikes. WCC dismissed petition filed by insurer to litigate whether worker was entitled to benefits under WCA after worker filed tort claim against insurer's insured. An insurer cannot use a declaratory judgment action to force a claimant to litigate a potential claim for benefits. Second,

in light of the employee's express waiver of any claim for WC benefits, no case or controversy exists between the parties, i.e. between the insurer and employee. Finally, insofar as a real controversy may exist concerning the effect of the waiver upon the tort claim, the insurer is without standing because, as a workers' compensation insurer, it has no personal stake in the outcome of that controversy. The Court hearing the tort claim is the forum to handle an argument over exclusivity of the WC remedy.

Jurisdiction: Case and Controversy. WCC dismissed petition filed by insurer to litigate whether worker was entitled to benefits under WCA after worker filed tort claim against insurer's insured. An insurer cannot use a declaratory judgment action to force a claimant to litigate a potential claim for benefits. Second, in light of the employee's express waiver of any claim for WC benefits, no case or controversy exists between the parties, i.e. between the insurer and employee. Finally, insofar as a real controversy may exist concerning the effect of the waiver upon the tort claim, the insurer is without standing because, as a workers' compensation insurer, it has no personal stake in the outcome of that controversy. The Court hearing the tort claim is the forum to handle an argument over exclusivity of the WC remedy.

¶1 On June 19, 1998, this Court entered an Order quashing discovery and staying further proceedings. It now dismisses the petition.

Discussion

¶2 The petition was filed by the insurer, Liberty Northwest Insurance Corporation. Liberty filed the petition after the claimant had filed a tort action against Liberty's insured, Boyne, USA. Liberty sought a determination as to whether claimant may waive her entitlement to workers' compensation benefits and whether Liberty is entitled to an independent medical examination (IME). Immediately upon filing its petition, Liberty sought discovery of claimant's psychological records, as well as an IME.

¶3 In her response, the claimant states that she is not seeking workers' compensation benefits. She states that if she "has filed a claim for compensation" then she "withdraws that claim, and waives any entitlement she may have to benefits afforded to her by the Workers' Compensation Act." (Shana Behr's Response to Petition, ¶ A. 2.) In light of her response, the petition must be dismissed.

¶4 Initially, as I have found in two previous cases, an insurer cannot use a declaratory judgment action to force a claimant to litigate a potential claim for benefits. *Champion International Corp. v. Brennan*, WCC, Order Dismissing Petition Without Prejudice, WCC No. 9504-7269 (June 13, 1995); *Lumbermens Mutual Casualty Company v. Mares*, Order Dismissing Petition, WCC No. 9707-7782 (September 19, 1997). I attach a copy of the *Mares* decision and incorporate herein what was said in part I of that decision.

¶5 Second, in light of the claimant's express waiver of any claim for workers' compensation benefits, no case or controversy exists as between the parties, i.e., between the insurer and claimant. Lacking a case and controversy between the parties, the Court lacks jurisdiction over the petition. *Bradshaw v. Bradshaw*, 270 Mont. 222, 236, 891 P.2d 506, 515 (1995).

¶6 Finally, insofar as a real controversy may exist concerning the effect of the claimant's waiver upon her tort claim against Boyne, Liberty is without standing to litigate that controversy. "A party has no standing when there is no personal stake in the outcome of the controversy." *In re Paternity of Vainio*, 943 P.2d 1282, 1286 (Mont. 1997). Liberty, as a *workers' compensation insurer*, has no personal stake in the outcome of the claimant's tort action against Boyne. In light of claimant's waiver of any claim for workers' compensation benefits, the federal court having jurisdiction over the claimant's tort action is the appropriate forum for resolution of any exclusive remedy issue arising under the Montana Workers' Compensation Act.

ORDER AND JUDGMENT

¶7 IT IS HEREBY ORDERED AND ADJUDGED that the petition in this matter should be and is hereby **dismissed**.

DATED in Helena, Montana, this 9th day of July, 1998.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Michael J. Lilly

Attached: *Lumbermens Mutual Casualty Company v. Mares*, Order Dismissing Petition, WCC No. 9707-7782 (September 19, 1997).

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9707-7782

LUMBERMENS MUTUAL CASUALTY COMPANY

Petitioner/Insurer for

BUTTREY FOOD & DRUG

Employer

vs.

CHARLES E. MARES

Respondent.

ORDER DISMISSING PETITION

The petition in this matter was filed by the insurer, Lumbermens Mutual Casualty Company (Lumbermens). According to the petition, the respondent/claimant (claimant) was injured in a motor vehicle accident on November 5, 1991, while working for Buttrey Food and Drug Company, which Lumbermens insured. (Petition for Trial, ¶ A.) The accident occurred in Billings. (*Id.* ¶ B.) Lumbermens accepted liability for the accident, but it now seeks to limit its liability. Specifically, it seeks the following relief:

- (1) A judgment determining that claimant's "current medical and psychological conditions are not related to his injury on November 5, 1991."
- (2) A declaratory judgment determining that its "liability for any benefits as a result of the November 5, 1991 injury has ended."
- (3) A judgment ordering claimant to reimburse it for medical and psychological benefits it has paid under a reservation of rights.

(*Id.* at 2.)

Claimant has responded to the petition with various motions. Initially, he moves to dismiss the petition. (Respondent's Motion to Dismiss, to Change Venue, and for Attorneys Fees; Or, in the Alternative, to Join Additional Parties.) In the event his motion to dismiss is denied, he moves for a change of venue and to join additional parties. (*Id.*) He supplements the foregoing motions with a motion for a protective order staying discovery until his substantive motions are decided and, in the event the Court denies his motion to dismiss, then for a new scheduling order. (Respondent's Motion to Vacate Scheduling Order and Motion for Protective Order.)

Discussion and Resolution

Since the Court finds the motion to dismiss meritorious, it will limit its discussion to that motion.

I.

Citing *Champion International Corp. v. Brennan*, WCC No. 9504-7269 (June 13, 1995), claimant moves to dismiss Lumbermens' first two claims on the ground that they are preemptive strikes. In *Brennan* this Court dismissed an insurer's petition seeking a determination that the claimant was *not* entitled to further benefits. The insurer was not paying benefits at the time of the petition; thus, it was not seeking to terminate ongoing

benefits, rather it sought to limit its future liability. This Court dismissed the petition, holding:

The cause of action in this case belongs to the claimant, not to the insurer. It is he who, under the Workers' Compensation Act, may be entitled to benefits for work-related injuries. Thus, the insurer's petition is one for declaratory judgment. "The purpose of declaratory relief is to liquidate uncertainties and controversies **which might result in future litigation** and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined." *In re Dewar*, 169 Mont. 437, 444, 548 P.2d 155 (1976) (emphasis added). Courts are not required to entertain every action for declaratory judgment. Even though all of the necessary elements of jurisdiction exist, the Court may, in its sound discretion, dismiss the action. *Brisendine v. Montana Department of Commerce*, 253 Mont. 361, 364, 833 P.2d 1019 (1992).

A declaratory judgment was never intended "to provide a substitute for other regular actions." *In re Dewar*, 169 Mont. at 444. Its primary purpose is "to determine the meaning of a law or a contract and to adjudicate the rights of the parties therein, but not to determine controversial issues of fact" *Raynes v. City of Great Falls*, 215 Mont. 114, 121, 696 P.2d 423 (1985); accord *Remington v. Department of Corrections*, 255 Mont. 480, 483, 844 P.2d 50 (1992). The Montana Supreme Court has adopted the general rule from C.J.S. on declaratory judgments in *State ex rel. Industrial Ind. Co. v. District Court*, 169 Mont. 10, 14, 544 P.2d 438 (1975). It said "'ordinarily a court will refuse a declaratory judgment which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action.'" (Quoting 26 C.J.S. Declaratory Judgments, section 16, page 81.)

Champion's response to the order to show cause confirms that its petition raises significant factual issues. It says, "The parties have significant differences of opinion on material facts and legal interpretations dealing with entitlement." (Consolidated Reply to Court's Orders to Show Cause at 4.) Factual issues are more appropriately raised in an action commenced by a claimant for benefits, not in a declaratory judgment action.

It is also uncertain whether claimant ever will pursue any action for further benefits. It is by no means certain that an adjudication concerning any of his claims will ever be required. Courts should not "determine matters purely speculative, enter anticipatory judgements, . . . adjudicate academic matters, . . . [or] provide for contingencies which may hereafter arise" *Department of Natural Resources & Conservation v. Intake Water Co.*, 171 Mont. 416, 440 (1976).

Champion cites a number of cases in support of its contention that it is entitled to pursue its present petition. All but one of the cited cases are distinguishable because they concern concrete claims for indemnification as between insurers, *EBI/Orion Group v. State*

Compensation Mutual Insurance Fund, 249 Mont. 449, 816 P.2d 1070 (1991); for repayment where the insurer has overpaid, *Champion International Corp. v. McChesney*, 239 Mont. 287, 779 P.2d 527 (1989) and *Aetna Life & Casualty Co. v. Main*, WCC No. 9112-6315 (decided July 21, 1992); for amounts allegedly due the insurer as a result of settlement of a third party action, *State Compensation Mutual Insurance Fund v. Mordja*, WCC No. 9202-6391 (decided September 16, 1992); or for repayment of amounts paid due to a claimant's fraud, *State Compensation Mutual Insurance Fund v. Chapman and Pyfer*, WCC No. 9207-6543 (decided September 1, 1993). The last cited case, *Connecticut Indemnity Co. v. Nerpel*, WCC No. 9206-6464 (decided June 30, 1993), did not address the appropriateness of an action brought by the insurer. It established no precedent with regard to the present question.

I conclude that the petition in this matter is an inappropriate action for a declaratory judgment and should be dismissed. The insurer cannot force a claimant to settle or litigate just so it can close its files. (*Id.* at 2-3.)

Lumbermens' first two requests for relief are indistinguishable from the request made in *Brennan*. At this point of time, claimant has not petitioned the Court for further benefits. He may never do so. Lumbermens cannot force him to do so. Lumbermens' first two causes of action must therefore be dismissed.

II.

As to Lumbermens' third request for relief, claimant alleges that the request was not mediated. In his reply brief, he provides copies of the requests for mediation. Neither of the two requests concern repayment of medical benefits paid by Lumbermens under a reservation of rights.

Mediation is a prerequisite to invoking this Court's jurisdiction to adjudicate disputes involving workers' compensation benefits. Mediation is mandatory and must be completed before a party may petition the Court for relief. Section 39-71-2401(1), MCA (1991), provides in relevant part:

(1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

Section 39-71-2408(1), MCA (1991), provides in relevant part:

(1) Except as otherwise provided, in a dispute arising under chapter 71 or 72 of this title, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a

solution to the dispute before either party may file a petition in the workers' compensation court.

39-71-2905, MCA (1991), provides in relevant part:

A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter.

In previous cases, this Court has held that the mediation must address the specific issue raised in the petition. "Parties cannot mediate one issue, then petition the Court with respect to other, non-mediated issues." *Debbie Gallup v. State Compensation Ins. Fund*, WCC No. 9604-7537, Order Dismissing Petition (5/21/96) at 2-3.

In this case, the parties have mediated only two issues. As set forth in the mediation notices attached to Insurer's Response to Respondent's Motion to Dismiss, to Change Venue, and for Attorneys Fees; Or, in the Alternative, to Join Additional Parties and Respondent's Motion to Vacate Scheduling Order and Motion for Protective Order, the issues mediated were:

[W]hether or not Mr. Mares [claimant] is entitled to further psychological treatment for the effects of his industrial injury.

[C]ompensability of Mr. Mares' future medical and compensation benefits.

(*Id.*, Exs. A and B.) While the factual dispute underlying Lumbermens' claim for reimbursement *might* be the same dispute underlying the mediated issues, the factual underpinnings for the dispute may also be unrelated to the two mediated issues. What transpired in the mediation is confidential. § 39-71-2410, MCA. Therefore, the Court cannot inquire into the actual mediation proceedings to determine if the unmediated issue overlaps the mediated issues. The reimbursement issue must be separately mediated and is therefore premature.

ORDER

For the reasons set forth in the forgoing discussion, the petition is **dismissed**.

DATED in Helena, Montana, this 19th day of September, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Sara R. Sexe

Mr. Thomas J. Murphy

Submitted: September 16, 1997