

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 54

WCC No. 9806-7992

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner/Insurer for

BOYNE, USA

Employers.

SHANA BEHR

Respondent.

**ORDER QUASHING ALL NOTICES OF DEPOSITIONS, SUBPOENAS, AND IME
EXAMINATIONS, AND STAYING FURTHER PROCEEDINGS**

Summary: The insurer filed a petition seeking a declaration that an individual who was allegedly injured during an explosion at a ski resort was an employee of the resort. The individual has already filed an action in federal court, presumably premised on the contention she was not an employee. Within eleven days of the filing of the petition in this Court, the insurer filed a motion to compel an IME and notices of deposition of the individual and two psychotherapists, which included requests to produce documents. Respondent moved to quash the depositions and subpoenas.

Held: Where the time for responding to the petition has not even elapsed, and where it appears the insurer may be attempting to move this case forward more quickly than the federal court action, indicating a possible pre-emptive strike disfavored by this Court, all depositions, subpoenas and IME notices are quashed, and further discovery stayed, until respondent has had a chance to respond and the motions are fully briefed.

Topics:

Declaratory Judgment: Pre-emptive Strikes. Where an insurer had filed a petition for declaratory judgment that an individual was an employee at the time of an explosion allegedly causing her injury, and the individual had already filed a lawsuit in federal court relating to the incident, the WCC quashed the insurer's motion to compel IME, depositions notices, and subpoenas, all filed within eleven days of the petition, before respondent had even had the chance to respond. All further

discovery was stayed until respondent has a chance to answer the petition and these motions and issues are fully briefed and decided.

Discovery: Generally. Where an insurer had filed a petition for declaratory judgment that an individual was an employee at the time of an explosion allegedly causing her injury, and the individual had already filed a lawsuit in federal court relating to the incident, the WCC quashed the insurer's motion to compel IME, depositions notices, and subpoenas, all filed within eleven days of the petition, before respondent had even had the chance to respond. All further discovery was stayed until respondent has a chance to answer the petition and these motions and issues are fully briefed and decided.

Discovery: Objections to Discovery. Where an insurer had filed a petition for declaratory judgment that an individual was an employee at the time of an explosion allegedly causing her injury, and the individual had already filed a lawsuit in federal court relating to the incident, the WCC quashed the insurer's motion to compel IME, depositions notices, and subpoenas, all filed within eleven days of the petition, before respondent had even had the chance to respond. All further discovery was stayed until respondent has a chance to answer the petition and these motions and issues are fully briefed and decided.

Discovery: Subpoenas: Quashing. Where an insurer had filed a petition for declaratory judgment that an individual was an employee at the time of an explosion allegedly causing her injury, and the individual had already filed a lawsuit in federal court relating to the incident, the WCC quashed the insurer's motion to compel IME, depositions notices, and subpoenas, all filed within eleven days of the petition, before respondent had even had the chance to respond. All further discovery was stayed until respondent has a chance to answer the petition and these motions and issues are fully briefed and decided.

¶1 This action arises out of a tragic incident which occurred at the Big Sky Ski resort on December 25, 1996. An explosive device went off prematurely and killed one individual. The petition in this matter was filed by the resort's insurer. According to the petition, another individual, Shana Behr, was present and received injuries to her knee, finger and face. The petition alleges that Behr was an employee of the ski area, which is owned by Boyne, USA.

¶2 Attached to the petition is a claim for workers' compensation allegedly filed by Behr. Behr, however, is pursuing a tort action against Boyne. She seeks damages for emotional distress arising out of the incident. The action was filed and is pending in the United States District Court for the District of Montana.

¶13 Boyne's workers' compensation insurer, Liberty Northwest Insurance Corporation, has petitioned this Court for a determination as to whether Behr can waive her claim for workers' compensation. It also requests the Court to order an independent medical examination of Behr to assist it in determining the benefits due Behr.

¶14 Despite the relatively short life of this case, it is generating a lot of heat and paper in a very short period of time. The petition was filed on June 8, 1998, eleven days ago. On June 10, 1998, Liberty filed a Motion to Compel Independent Medical Evaluation and Supporting Brief. On June 10th, Liberty noticed the deposition upon written questions of Timothy J. Tate, a psychotherapist, for June 22, 1998. On June 10th, it noticed the deposition upon written questions of John A. Platt, Ph.D., who is apparently another psychotherapist, for June 30, 1998. Both deposition notices request production of records relating to Behr's mental and emotional distress. On June 12th, Liberty noticed the deposition of Behr for July 13th. On June 16th, Behr moved to quash the depositions and the subpoenas for the psychological records.

¶15 If the adage that a rolling stone shall gather no moss has any truth to it, then Liberty is free of all moss and might be better characterized as a well-oiled steam-roller.

¶16 The time for a response has not yet expired. The jurisdiction of a federal court has been invoked. On the face of this matter, there is an issue as to whether claimant can be compelled to seek workers' compensation benefits by way of a declaratory judgment action. In a previous action, this Court held that it lacked jurisdiction over an insurer's preemptive strike. *Lumbermens Mutual Casualty Co. v. Mares*, WCC No. 9707-7782, Order Dismissing Petition (Sept. 19, 1997).

¶17 I will be out of state from June 23, 1998 until July 6th. Commencing July 7th, I am scheduled to be in Billings for trials.

¶18 The time ordinarily allocated for the briefing of these motions will not have expired prior to my leaving, and frankly, I do not see the urgency of my finally deciding these matters. If this is a race to gain advantage in the federal court case, then I decline the invitation to become involved in it. I am therefore quashing all depositions, subpoenas, and IME notices, and staying all discovery until Behr has had an opportunity to file a response and until the motions are fully briefed. I will then address the merits of the motions.

¶19 SO ORDERED.

DATED in Helena, Montana, this 19th day of June, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Larry W. Jones - U.S. Mail & FAX
Mr. Michael J. Lilly - U.S. Mail & FAX