

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 39

WCC No. 2002-0588

IN THE MATTER OF

TIM DICK, Guardian *Ad Litem* for

ALICIA M. BAARSON, BRITTANY E. BAARSON

and BRADLEY A. BAARSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION AND ORDER PERMITTING INTERVENTION

Summary: Employer seeks to intervene in a death benefits case being defended by its insurer on the basis that the decedent's death did not arise "out of her employment."

Held: Where the beneficiaries of the decedent are pursuing both death benefits under the Workers' Compensation Act and a civil action against the employer, the employer will be allowed to intervene where it alleges that the beneficiaries are using the Workers' Compensation Court action for discovery in the civil matter without the participation of the employer, the employer's defense in the civil action may rely on facts and law common in the Workers' Compensation Court case, and the insurer is doubtful it can adequately protect the employer's interests in light of its own independent duties to injured workers.

Topics:

Procedure: Intervention. Where the beneficiaries of the decedent are pursuing both death benefits under the Workers' Compensation Act and a civil action against the employer, the employer will be allowed to intervene where it alleges that the beneficiaries are using the Workers' Compensation Court action for discovery in the civil matter without the participation of the employer, the employer's defense in the civil action may rely on facts and law common in the Workers' Compensation Court case, and the insurer is doubtful it can adequately protect the employer's interests in light of its own independent duties to injured workers.

¶1 This is a death action brought on behalf of the beneficiaries of Kimberly Baarson, who was killed at work by her estranged husband. The State Fund insured the employer, Town Pump, however, it denies liability on the ground that the claimant's death did not arise out of her employment.⁽¹⁾

¶2 Town Pump moves to intervene in this action. It acknowledges that under Rule 24.5.309(2) its motion is late but urges that there is good cause to waive the time limits set out in the rule.⁽²⁾ Specifically, it argues that the ground for intervention arose only recently.

¶3 The ground urged as good cause for intervention is an alleged discovery abuse by the petitioner, who is the guardian *ad litem* for the Baarson children. Petitioner has filed a separate civil action on their behalf in district court. The action is against Town Pump and it argues that petitioner is attempting to use discovery in this case to build evidence in the civil case. The State Fund agrees that "[b]ased on recent discovery requests, it is apparent Petitioner seeks to make a record relevant to issues outside the narrow question before the Court." (State Fund's Response to Motion to Intervene at 2.) It supports Town Pumps motion, urging that it "should be allowed to protect its interests." (Id.)

Discussion

¶4 The permissible grounds for intervention are spelled out in Rule 24(a) and (b) of the Montana Rules of Civil Procedure, as incorporated by reference into the Workers' Compensation Court Rules, Rule 24.5.309(a).⁽³⁾ Rule 24, Mont.R.Civ.P. provides in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

¶15 Town Pump points out that if the claimant's death arose "out of and in the course of" her employment, § 39-71-407(1), MCA, then it is entitled to pursue an exclusivity defense based on section 39-71-411, MCA, which provides in relevant part: " Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers' Compensation Act, an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act" It, therefore, clearly has an interest in the outcome of the present litigation and in the development of facts pertaining to that issue. Thus, under subsection (b), it has established a sufficient interest for permissive intervention. The State Fund is doubtful that it can protect Town Pump's interests even in the discovery process since it has a direct duty to injured workers and must make its decisions based on its own independent analysis rather than the wishes of the employer. (State Fund's Brief in Response to Town Pump's Motion to Intervene at 2.) I am therefore persuaded that whether or not Town Pump has a right to intervene it should be permitted to do so under subsection (b) of Rule 24, Mont.R.Civ.P. I further find good cause for permitting the late filing of the motion. The grounds giving rise to the motion have only recently become evident.

¶16 The parties shall continue to adhere to the scheduling order presently in effect in order that the intervention will not unduly delay an adjudication in this case. The Court also perceives no prejudice to the rights of the claimant in allowing Town Pump to intervene.

ORDER

¶17 Finding good cause, Town Pump's motion to intervene is **granted**. The parties, including intervenors, shall adhere to the scheduling order presently in effect.

¶18 I further find good cause for permitting the late filing of the motion. The discovery giving rise to the motion has only recently become evident.

DATED in Helena, Montana, this 2nd day of June, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Michael J. McKeon

Mr. Greg E. Overturf

Mr. Brendon J. Rohan

Submitted: May 20, 2003

1. Section 39-71-407(1), MCA, provides liability for injuries "arising out of and in the course of employment." The "arising out of" language "is related to the concept of causation," i.e., to whether there is a causal nexus between the injury or death and the

employment. *Pinyerd v. State Compensation Ins. Fund.*, 271 Mont. 115, 894 P.2d 932, 934-35 (1995).

2. Rule 24.5.309(2) provides in relevant part, "(2) Unless otherwise permitted by order of the court, a motion to intervene must be served within 30 days of the service of the petition by the court. "

3. Rule 24.5.309(1) provides, "(1) Intervention in a pending proceeding shall be governed by the considerations set forth in Rule 24(a) and (b) of the Mont.R.Civ.P."