IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 26

WCC No. 9909-8316

INSURANCE COMPANY OF STATE OF PENNSYLVANIA

Petitioner/Insurer

and

CAROL RENEE BERQUIST

Claimant/Respondent,

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

ORDER GRANTING MOTION TO AMEND RESPONSE

Summary: Insurer which had paid benefits to claimant sought indemnification from carrier at risk following earlier injury (State Fund). State Fund sought to amend its response to WCC petition to allege that it should not be required to indemnify other insurer for medical benefits which were unreasonable or for temporary total disability benefits claimant should not have received because he was able to work. Other insurer argued that State Fund's motion to amend was untimely under Court Rules.

Held: Good cause existed to extend deadline for filing motion by one day where parties had already agreed to postpone trial date and proposed amendment appeared to state tenable defense. In allowing amendment, WCC noted one insurer has right to claim indemnification for benefits which "should have been paid" by another carrier. Question raised is whether what "should have been paid" can be determined by hindsight and regarding appropriate standard for refusing indemnification for medical or disability benefits on the ground they were not reasonably paid.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Workers Compensation Court Rules: ARM 24.5.316.** Where time for filing motion to amend response to petition has been set in WCC scheduling order, and missed by one day by moving party, the question is whether there is good cause to extend the deadline and excuse the

moving party from its failure to file a timely motion. Where the deadline was missed by one day, the parties have already agreed to postpone the trial date, and the proposed amendments appear to state tenable defenses, the amendment of the response is allowed.

Indemnification: Between Insurers. Insurer which had paid benefits to claimant sought indemnification from carrier at risk following earlier injury (State Fund). State Fund sought to amend its response to WCC petition to allege that it should not be required to indemnify other insurer for medical benefits which were unreasonable or for temporary total disability benefits claimant should not have received because he was able to work. In allowing amendment, WCC noted one insurer has right to claim indemnification for benefits which "should have been paid" by another carrier. Question raised was whether what "should have been paid" may be determined by hindsight, which WCC doubted was proper standard. Although not resolving issue because not adequately briefed, WCC suggested that if insurer used reasonable judgment in adjusting claim it may be inequitable to deny indemnification based upon subsequently discovered facts. On the other hand, if insurer's adjustment practices were unreasonable and it paid, for example, benefits for medical procedures it knew or should have known, at the time of payment, were not reasonable, then it may be inequitable to allow indemnification.

Procedure: Motions: Generally. Where time for filing motion to amend response to petition has been set in WCC scheduling order, and missed by one day by moving party, the question is whether there is good cause to extend the deadline and excuse the moving party from its failure to file a timely motion. Where the deadline was missed by one day, the parties have already agreed to postpone the trial date, and the proposed amendments appear to state tenable defenses, the amendment of the response is allowed.

¶1 The Court has before it the respondent State Compensation Insurance Fund's motion to amend its response to the petition. The motion is **granted** with the proviso set forth in the discussion below.

Factual Background

¶2 Petitioner, Insurance Company of State of Pennsylvania (Pennsylvania), and respondent State Fund are insurers for successive work-related injuries suffered by claimant. State Fund was the insurer at risk for a first back injury which occurred September 3, 1996. It accepted liability for the injury and paid benefits. Thereafter, claimant returned to work at another job. In late March 1998, she ceased work on account of back pain. At that time, her employer was insured by Pennsylvania, however, in late April the State Fund commenced benefits under a reservation of rights. Later, in August 1998, the State Fund stopped benefits based upon its determination that claimant had suffered a new injury in March

1998. Pennsylvania then began paying benefits but alleges in this action that the State Fund is liable for the benefits because claimant either had not reached maximum medical improvement in March 1998, or she suffered only a temporary aggravation of her preexisting condition. Through this action, it seeks indemnification from the State Fund for benefits it has paid the claimant.

¶3 The petition herein was filed on September 7, 1999, and initially set for trial during the week of February 21, 2000. (September 14, 1999 Scheduling Order.) On October 13, 1999, the State Fund filed its response.

¶4 On February 14, 2000, at the request of the parties, an Order Resetting Scheduling Order was issued resetting the trial for the week of May 8, 2000. The Order provided that all pretrial motions, including motions to amend pleadings, must be filed "on or before March 31, 2000." (Order Resetting Scheduling Order, underlining in original.) It further required that all written discovery was to be served by March 24, 2000, and lists of witnesses and exhibits exchanged by March 31, 2000. (*Id*.)

¶5 On April 4, 2000, the Court received the State Fund's Motion to Amend Response to Petition for Hearing, Memorandum in Support of Motion to Amend Response to Petition, and a proposed Amended Response to Petition for Hearing, all of which were dated and sent April 3, 2000. Under this Court's rules, the documents were deemed filed on April 3, 2000. Rule 24.5.303(5).[(1)]

¶6 In its amended response, the State Fund seeks to raise two issues regarding the amounts it may owe Pennsylvania. First, it asserts it should not have to reimburse Pennsylvania for some medical expenses which it alleges were unreasonable. Second, it alleges it should not have to reimburse Pennsylvania for some portion of temporary total disability benefits. This latter allegation is based on surveillance conducted by an investigator hired by the State Fund. According to the State Fund, the surveillance shows claimant engaging in various physical activities "that would appear potentially inconsistent with Claimant's stated physical capacity, and potentially inconsistent with the Petitioner's ongoing payment of temporary total disability benefits to the Claimant." (Memorandum at 2.)

Objections to the Motion

¶7 Claimant does not resist the motion to amend, however, Pennsylvania does. In opposing the motion, Pennsylvania points out that the State Fund received the investigative report on February 4, 2000, a full 60 days before it filed its motion. (Objection to Motion to Amend Response to Petition at 2 and Ex. D.) It further points out that much of the information concerning medical payments forwarded to the State Fund was forwarded prior to January 2000 (*Id*. at 2 and Exs. B and C), and that the full amount of medical benefits was provided to the State Fund in December 1999 (*Id*. at 2 and Ex. C.) Pennsylvania argues that the two

new issues raised by the State Fund have not been mediated and would require additional discovery, thus potentially delaying a trial.

Discussion

¶8 The time for filing a motion to amend a pleading is governed by Rule 24.5.316(1), which provides.

> (1) Unless a different time is specified in these rules, **the time for filing any motion to amend a pleading**, to dismiss, to quash, for summary judgment, to compel, for a protective order, in limine, or for other relief **shall be fixed by the court in a scheduling or other order**. [Emphasis added.]

Since the scheduling order fixed March 31, 2000, as the deadline for filing a motion to amend a pleading, the State Fund's motion is untimely. The question posed to the Court therefore becomes whether there is good cause to extend the deadline and thereby relieve the State Fund from its failure to timely file its motion.

¶9 State Fund cites Rule 15(a), Mont.R.Civ.P., as authority for granting its motion to amend. That rule provides that under circumstances inapplicable here, a party may amend the party's pleading once as a matter of course, otherwise it must obtain leave of court to amend. The rule further provides that "leave shall be freely given when justice so requires."[(2)] Unlike this Court's rule, however, Rule 15(a) does not fix a time for filing a motion for leave to amend. While this Court has no quarrel with Rule 15(a)'s proviso that "leave shall be freely given when justice so requires," the State Fund's failure to comply with the deadline for filing its motion must be considered in determining whether "justice" requires the Court to grant its motion.

¶10 The State Fund offers no excuse or explanation for the delay in filing its motion. It has not filed a reply brief to Pennsylvania's brief in opposition to the motion, nor has it contested the exhibits Pennsylvania attached to its brief. The Court must therefore accept Pennsylvania's statement that the State Fund had the investigative report which gave rise to the requested amendment some 60 days prior to the Court's deadline. As to the reasonableness of the medical bills, the State Fund offers no explanation of what evidence, if any, it did not have prior to the deadline. Balanced against these considerations is the fact that the motion was late only by one business day. (March 31st was a Friday and April 3rd a Monday.) In addition, Pennsylvania does not raise the missed deadline as a ground of its opposition. Finally, the parties have since agreed to a special trial setting of June 30, 2000, thus giving the parties an additional two months if additional discovery is necessary.

¶11 The general rule governing amendments to pleadings was long ago expressed in the following terms:

> 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.

Fowlis v. Heinecke, 87 Mont. 117, 120, 287 P. 169, 170 (1930); accord *Northern Montana Ass'n of Credit Men v. Hauge,* 111 Mont. 56, 105 P.2d 1102, 1104 (1940). While the State Fund might have filed its motion to amend at an earlier time, the Court's scheduling Order allowed it to file the motion on March 31st and it was only a day late. In light of the rescheduling of the trial, it is doubtful that the amendment will prejudice Pennsylvania. I am therefore inclined to extend the time for filing by one day and grant the motion.

¶12 However, the motion cannot be granted unless the proposed amendments raise legally tenable defenses to Pennsylvania's request for full indemnification. "[A]lthough . . . leave to amend shall be freely granted, amendments should not be allowed where the theory presented by the amendment is totally inapplicable to the case . . . ." *McGuire v. Nelson,* 162 Mont. 37, 42, 508 P.2d 558, 560 (1973). Pennsylvania argues that defenses raised by the proposed amendments are legally untenable.

¶13 At issue is the scope of the right of indemnification. Pennsylvania argues that if the Court finds the State Fund is responsible for the claim, then it had a duty to accept liability and pay benefits, and cannot now second guess Pennsylvania's payments of benefits. (Objection to Motion to Amend Response to Petition at 3.) State Fund argues that the right of indemnity extends only to sums it "should have paid" and does not extend to benefits paid but to which claimant was not in fact entitled. It seizes on language in *Chaney v. USF&G,* 276 Mont. 513, 519-20, 916 P.2d 912, 916 (1996), which said:

> We have recognized a workers' compensation insurer's right to recover benefits that should have been paid by another carrier. For example, in *EBI/Orion Group v. State Comp. Ins. Fund* (1989), 240 Mont. 99, 104, 782 P.2d 1276, 1279, we stated that "[t]he right of indemnity is that where one is compelled to pay money which, in justice, another ought to pay, the former may receive from the latter the sum so paid." We have also stated:
>
> > If it is later determined that the insurance company on risk at the time of the accident should not pay the benefits, this insurance company, of course, has a right to seek indemnity from the insurance company responsible for the benefits already paid out to the claimant.

Belton v. Hartford Accident & Indem. Co. (1983), 202 Mont. 384, 392, 658 P.2d 405, 409-10.

¶14 The question raised is whether what "should have been paid" is to be determined by hindsight. I think not. If the State Fund had accepted liability, then Pennsylvania would not have been required to adjust the claim at all. If Pennsylvania used reasonable judgment in adjusting the claim it would be inequitable to deny it reimbursement based upon

subsequently discovered facts. On the other hand, if Pennsylvania's adjustment practices were unreasonable and it paid, for example, benefits for medical procedures it knew or should have known, at the time of payment, were unreasonable, then it would be inequitable to order the State Fund to reimburse it for those benefits.

¶15 However, the limits, if any, of recovery under indemnity principles have not been adequately briefed or argued. The Court's own quick review of Montana cases indicates there are no Montana cases on point, or even analogous. I therefore will permit the amendments but reserve ruling as to whether the State Fund may be liable for unreasonable medical payments or for benefits which appeared reasonable at the time paid but in retrospect were not due.

ORDER

¶16 Based on the foregoing discussion, leave is granted the State Fund to file its amended response. Since the amended response is already lodged as an attachment to the State Fund's motion, it will be stamped as filed on today's date and no further filing is necessary.

¶17 A new scheduling order will issue extending the deadlines for further discovery and for other pretrial matters.

DATED in Helena, Montana, this 5th day of May, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. G. Andrew Adamek
Mr. Richard J. Martin
Mr. Charles G. Adams
Submitted: April 24, 2000

1. The rule provides:

> (5) Unless the court specifically orders otherwise, filing with the court may be accomplished by mail addressed to the clerk, and such filing will be deemed complete on the date shown on the certificate of mailing.

2. Rule 15(a) provides in full:

> **RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS**
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> (a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is

served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.