IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 36

WCC No. 2002-0537

ANTHONY BRANDON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer for

ELENBURG EXPLORATION COMPANY, INCORPORATED

Employer.

ORDER GRANTING MONTANA STATE FUND'S MOTION TO DISMISS

Summary: A worker suffering from an occupational disease (carpal tunnel syndrome) brought an action on account of his employer's failure to rehire him, citing the two-year rehiring preference specified in section 39-71-317(2), MCA (1999). He joined the insurer liable for his occupational disease as a defendant to his action. The insurer (Montana State Fund) moves to dismiss.

Held: The petitioner fails to state a claim against the insurer. The statute governing rehiring of an injured employee creates a cause of action against the employer only. The fact that the insurer may read the statute differently or have statutory authority to request an independent medical examination is not grounds to keep the insurer in the action.

Topics:

Defenses: Failure to State a Claim. Statute creating a rehiring preference for injured employees creates a cause of action against an employer failing to follow the statute but it does not create a cause of action against the employer's insurer. An insurer is not a proper party to such action. § 39-71-317, MCA (1999).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-317, MCA (1999). Statute creating a rehiring preference for injured employees creates a cause of action against an employer failing to follow the statute but it does not create a cause of action against the employer's insurer. An insurer is not a proper party to such action.

¶1 The petitioner, who suffered carpal tunnel syndrome while working for Elenburg Exploration Company, Incorporated (Elenburg), commenced this action under section 39-71-317(2)-(4), MCA, naming both Elenburg and the Montana State Fund as respondents. The State Fund was named because it insured Elenburg and accepted liability for the petitioner's claim. It moves to dismiss the claim against it, noting it has no interest in the matter. In essence it is a motion to dismiss for failure to state a claim upon which relief can be granted against it. Rule 12(b)(6), Mont.R.Civ.P. [(1)]

Discussion

¶2 The standard which is applicable to motions to dismiss for failure to state a claim is set out most recently in *Bar OK Ranch, Co. v. Ehlert*, 2002 MT 12, 40 P.3d 378 at ¶ 31, as follows:

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. (Quoting from Cut Bank v. Tom Patrick Const. Inc., 1998 MT 219, ¶ 6, 290 Mont. 470, ¶ 6, 963 P.2d 1283, ¶ 6 (citation omitted).)

Thus, the question raised upon Elenburg's motion is whether the petition on its face demonstrates that petitioner can prove no set of facts which would entitle him to relief against it.

¶3 Section 39-71-317, MCA, provides in relevant part:

> (2) When an injured worker is capable of returning to work within 2 years from the date of injury and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker's physical condition and vocational abilities.
>
> (3) This preference applies only to employment with the employer for whom the employee was working at the time the injury occurred.
>
> (4) The workers' compensation court has exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference under this section. A dispute concerning the reemployment preference is not subject to mediation or a contested case hearing.

According to the petition, petitioner was released to return to work in his previous job following carpal tunnel surgery, however, his employer refused to rehire him in his previous position or for any other job.

¶4 On its face, the section governs the petitioner's relationship with his prior employer; any remedy is against the employer. The statute provides no cause of action against the insurer.

¶5 Nonetheless, Elenburg resists the motion. Initially, it argues that the State Fund should not be dismissed because in its response to the petitioner it admitted matters, such as the applicability of the statutory preference to petitioner, it should not have admitted. The ground is without merit. Since there is no cause of action against the State Fund, its admissions are immaterial. They are not binding on the employer in any event.

¶6 Second, Elenburg argues that the State Fund should not be dismissed because petitioner's physical condition and capacity to perform his previous job is at issue and the State Fund has a right to demand an independent medical examination (IME) or functional capacity examination (FCE). Whether or not Elenburg contests petitioner's ability to return to work, the State Fund does not. The purpose of an IME or FCE is to assist the insurer in adjusting the claim, not to aid an employer in its defense of a claim under section 39-71-317, MCA. Elenburg's second argument is without merit.

¶7 The petitioner has weighed in on the side of the employer but with great respect for brevity. In a brief consisting of three short paragraphs, he urges that the State Fund should be retained as a respondent because its determination that he could return to his previous job is at odds with the employer's apparent position. Any quarrel between the insurer and the employer is beyond the issues raised in this case.

ORDER

¶8 There being no cause of action stated against the State Fund, the Petition for Trial is **dismissed with prejudice as to the Montana State Fund**.

DATED in Helena, Montana, this 10th day of July, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Ms. Ann E. Clark
Mr. James R. Hintz

Submitted: June 4, 2002

1. Rule 12(b)(6) provides that a failure to state a claim upon which relief may be granted may be raised in a motion to dismiss.