IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
WCC No. 9411-7186

CNA INSURANCE COMPANIES

Petitioner

vs.

KENNETH RAYLON DUNN

UNINSURED EMPLOYERS' FUND

and BIG TRUCK PRODUCTIONS

Respondents.

ORDER AND JUDGMENT DISMISSING PETITION

This action for declaratory judgment was commenced by CNA Insurance Companies on November 22, 1994. The petition seeks a determination that CNA provide workers' compensation insurance coverage with respect to an August 17, 1993 industrial injury suffered by Kenneth R. Dunn (Dunn) while working for Big Truck Productions (Big Truck). Dunn, as well as Big Truck and the Uninsured Employers' Fund (UEF), are named as respondents.

According to the petition, Dunn claims to have suffered an industrial injury on or about August 17, 1993, while working for Big Truck. (Petition for Declaratory Judgment, at 1, ¶ 4.) The petition further alleges that at the time of the alleged injury, Big Truck was insured by CNA. (*Id.* at 1, ¶ 5.) The first prayer for relief requests that the Court find and order that "[i]nsurance coverage for workers' compensation benefits existed and is available to Respondent Dunn under the policy issued by CNA Insurance Company." (*Id. at 3.*)

On its face, the request for declaratory judgment is odd. An insurer is free to admit liability without permission or order of the Court. It is not harmed if the injured worker refuses to accept benefits.

The response filed by Dunn, however, provides additional information illuminating the real nature of the dispute. In that response, Dunn alleges that he indeed suffered a work-related injury August 17, 1993. (Respondent Dunn's Response to Petition for Hearing, Contentions 1-3.) However, Big Truck informed him that workers' compensation insurance was provided through its payroll company, Axium. (*Id.* Contention 4.) When he checked with the Montana Department of Labor and Industry (DLI), Dunn learned that there was no record of insurance coverage for Big Truck. (*Id.*, Contention 6-7.) Concluding that Axium's policy did not provide coverage and that Big Truck was otherwise uninsured, on February 16, 1994, Dunn commenced district court

action directly against Big Truck. (*Id.*, Contention 9.) In Count 1, the complaint invoked the court's jurisdiction under section 39-71-515, MCA, alleging that Big Truck was an uninsured employer. (*Id.*, Contention 11.) The complaint also set forth two separate counts for negligence: one count of negligence for the injury itself and the other for the employer's failure to maintain workers' compensation coverage. (*Id.*)

On March 25, 1994, which was over a month after the filing of the action and more than seven months after the alleged injury, Big Truck for the first time asserted that it had workers' compensation insurance coverage under the CNA policy which is the subject of the present petition. (*Id.*, Contention 12.) Despite the emergence of the CNA policy, Dunn persists in his claim that Big Truck was uninsured, alleging that the CNA policy was not properly registered with the DLI and that it does not properly provide coverage with respect to his injuries. (*Id.,* Contentions 13-14.) He also alleges that Big Truck is estopped from arguing that it is insured. (*Id.*, Second Affirmative Defense.)

In his response, Dunn also alleges that the district court has exclusive jurisdiction to determine the existence of coverage. In light of that allegation the Court invited the parties to brief the following issues:

> (1) Does the Workers' Compensation Court have either exclusive or concurrent jurisdiction to determine whether there was workers' compensation insurance covering Mr. Dunn's industrial accident?
>
> (2) If the Workers' Compensation Court has concurrent jurisdiction to determine the coverage issue, should or must it nonetheless defer to the District Court to make that coverage decision?

(Order Directing Parties to Brief Jurisdictional Issue; Order Vacating Scheduling Order and Staying Discovery, issued January 6, 1995.) CNA, the UEF and Dunn have all filed briefs. Dunn's brief was accompanied by a motion to dismiss for lack of jurisdiction. (Respondent Dunn's Combined Brief in Response to Court's Questions and Motion to Dismiss.)

Discussion

The parties are at opposite poles in their jurisdictional analyses. Dunn asserts that the district court has exclusive jurisdiction, citing section 39-71-515, MCA, and ***Bohmer v. Uninsured Employers' Fund,*** *51 St.Rpt. 824 (1995)*. CNA and the UEF argue that ***Bohmer*** is inapposite; that the issue raised in the petition concerns benefits payable to Dunn; and that the Workers' Compensation Court has exclusive jurisdiction. In addressing the Court's question concerning concurrent jurisdiction, the parties predictably take opposite positions regarding which court should defer to the other.

"Jurisdiction as applied to courts is the power or capacity *given by law* to a court to entertain, hear and determine the particular case or matter." ***State ex. rel. Johnson v. District Court,*** *147 Mont. 263, 267, 410 P.2d 933 (1966) (quoting from* ***State ex rel. Bennett v. Bonner,*** *123 Mont. 414, 214 P.2d 747, 753 (1950)) (italics in original).* As applied to a particular controversy, jurisdiction "is the power to hear and determine that controversy." ***Haggerty v. Sherburne Mercantile Co.,*** *120 Mont. 386, 389, 186 P.2d*

884 (1947) (quoting from ***Reed v. Woodman of the World,*** *94 Mont. 374, 22 Pac. (2d) 819,821).* Jurisdiction encompasses jurisdiction over the parties and jurisdiction over the subject matter. ***Id.*** It is the latter aspect of jurisdiction which is at issue herein.

Subject matter jurisdiction is jurisdiction over the particular cause of action and the relief sought. ***Id.*** Section 39-71-515, MCA[(1)], creates an independent cause of action against an uninsured employer. Under the section, the injured employee may recover the amounts that he would have received had the employer maintained insurance, along with attorney fees and costs. The district court has exclusive jurisdiction over this particular cause of action. ***Bohmer***; § 39-71-516, MCA. The district court also has jurisdiction over civil actions alleging negligence. § 3-5-302(c), MCA.

One of the elements of a cause of action under section 39-71-515, MCA, is that the employer was uninsured. Similarly, proof that the employer was uninsured is essential to maintaining an action for negligence against an employer. Section 39-71-411, MCA, which is the exclusive remedy section, provides that an insured employer is not liable to an injured employee. Sections 39-71-508 and -509, MCA, expressly provide that an injured employee may bring an action in damages against his employer if the employer was uninsured. So long as Dunn alleged the requisite facts essential to his causes of action in district court, that court has jurisdiction to adjudicate his claims, ***Haggerty,*** *120 Mont.* at 390, including all facts necessary to prove those claims. Thus, the district court has jurisdiction to determine whether or not Big Truck was insured or uninsured at the time of Dunn's alleged industrial accident.

But it is equally clear that the Workers' Compensation Court has jurisdiction to decide the same issue in an action concerning benefits under the Workers' Compensation Act. Section 39-71-2905, MCA, 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 ***State ex rel. Uninsured Employers' Fund v. The Honorable William E. Hunt,*** *191 Mont. 514, 519, 625 P.2d 539 (1981),* the Supreme Court construed this jurisdictional grant broadly as authorizing the Workers' Compensation Court "to determine which of several parties is liable to pay the Workers' Compensation benefits, or if subrogation is allowable, what apportionment of liability may be made between insurers, and other matters that go beyond the minimum determination of the benefits payable to an employee." The dispute in this case concerns benefits. CNA alleges that it is liable to Dunn for benefits. Dunn denies the allegation, responding, "The CNA policy does not properly provide coverage for Respondent's injury." (Respondent Dunn's Response to Petition for Hearing, Contention 14.) The Workers' Compensation Court therefore has subject matter jurisdiction over the dispute.

Having first invoked the jurisdiction of the district court pursuant to section 39-71-515, MCA, Dunn argues that the district court has exclusive jurisdiction to determine whether Big Truck was uninsured. He cites the Supreme Court's decision in ***Bohmer*** as authority for his contention***. Bohmer***, however, is inapposite.

In ***Bohmer*** the injured employee brought a district court action under section 39-71-515, MCA. The fact that the employer was uninsured was *admitted.* ***Bohmer v. Uninsured Employers' Fund,*** *WCC No. 9311-6933* (Order Dismissing Petition, January 21, 1994). The district court stayed its own proceedings to allow this Court to determine "the extent of the Plaintiff's injury and damages to which he would have been entitled under Section 39-71-515 M.C.A. . . ." ***Id.*** This Court held that it lacked jurisdiction to do so, and the Supreme Court affirmed.

The situation in the present case is different. The Workers' Compensation Court is not being asked to exercise jurisdiction over an action commenced under section 39-71-515, MCA. It is being asked to determine an insurer's liability for benefits. While that request may involve questions of fact that are common to those arising in the district court action, the request is independent of that action and is one over which this Court has exclusive jurisdiction. Under the jurisdictional principles cited earlier, both court's have jurisdiction over their respective actions and both have jurisdiction to resolve all factual and legal issues essential to those actions.

Nonetheless, I have determined that the insurance issue raised by CNA's petition should be decided by the district court. As noted at the beginning of this order, CNA does not need this Court's approval to admit coverage with respect to Dunn's injury. Dunn's refusal to pursue or accept benefits from CNA does not prejudice CNA. The only foreseeable impact of a decision by this Court is the impact it would have in the district court action. Indeed, the present petition appears to be a calculated attempt to circumvent a determination by the district court.

A similar attempt was rebuffed in ***State ex rel. Broesder v. Industrial Accident Board,*** *154 Mont. 178, 461 P.2d 456 (1969).* In that case an electrocuted worker (Broesder) brought a third-party negligence action against Duty & Jones Construction Co. (Duty & Jones). His regular employer at the time of the accident was Hill County Electric Co-operative, Inc. (Co-op) and the Co-op's insurer had accepted liability for his injuries and paid benefits. Some seven months after the filing of the third-party action and twenty-eight months after the injury, Duty & Jones filed an employer's first report of injury and simultaneously filed a petition with the Industrial Accident Board (IAB) seeking a determination that it was in fact Broesder's employer. Duty & Jones then persuaded the district court to vacate the trial setting in the third-party case. Broesder then applied to the Supreme Court for a writ directing the district court to proceed in the third-party action and the IAB to desist from further proceedings. The Supreme granted the writ, holding:

> Under the circumstances of this case, Duty & Jones did not timely invoke the jurisdiction of the IAB; jurisdiction here is in the district court as to the defense of "exclusive remedy." At this stage of the proceedings, the lawsuit cannot be divided into pieces in other forums.

154 Mont. at 183. While in this case the time between the injury and the petition is not as long as in ***Broesder***, the time between the district court complaint and the petition to this Court is longer (nine months). I find that the facts are sufficiently similar to reach the same conclusion as reached in ***Broesder*** and hold that the petition should be dismissed.

There is a second ground for dismissing the present petition. This is a declaratory judgment action. The Court is not required to issue a declaratory ruling even though all of the necessary elements for jurisdiction exist. ***Brisendine v. Montana Department of Commerce,*** *253 Mont. 361, 364, 833 P.2d 1019 (1992).* In my sound discretion I may dismiss a petition for declaratory judgment. ***Id.*** Exercising that discretion under the circumstances of this case, I find it inappropriate to consider the petition and I hold that it should be dismissed.

JUDGMENT

1. For the reasons set forth in this decision, it is hereby ordered that the petition is **dismissed without prejudice**.

2. The Order and Judgement Dismissing Petition herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

Dated in Helena, Montana, this 20th day of March, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Todd A. Hammer
Mr. Kevin Braun
Mr. Chris J. Ragar
Ms. Elizabeth Heckscher

APPENDIX

> **39-71-515. Independent cause of action.** (1) An injured employee or the employee's beneficiaries have an independent cause of action against an uninsured employer for failure to be enrolled in a compensation plan as required by this chapter.
>
> (2) In such an action, prima facie liability of the uninsured employer exists if the claimant proves, by a preponderance of the evidence, that:
>
> (a) the employer was required by law to be enrolled under compensation plan No. 1, 2, or 3 with respect to the claimant; and
>
> (b) the employer was not so enrolled on the date of the injury or death.
>
> (3) It is not a defense to such an action that the employee had knowledge of or consented to the employer's failure to carry insurance or that the employee was negligent in permitting such failure to exist.

(4) The amount of recoverable damages in such an action is the amount of compensation that the employee would have received had the employer been properly enrolled under compensation plan No. 1, 2, or 3.

(5) A plaintiff who prevails in an action brought under this section is entitled to recover reasonable costs and attorney fees incurred in the action, in addition to his damages.

39-71-411. Provisions of chapter exclusive remedy -- nonliability of insured employer. For all employments covered under the Workers' Compensation Act or for which an election has been made for coverage under this chapter, the provisions of this chapter are exclusive. 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 or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of such injuries or death. The Workers' Compensation Act binds the employee himself, and in case of death binds his personal representative and all persons having any right or claim to compensation for his injury or death, as well as the employer and the servants and employees of such employer and those conducting his business during liquidation, bankruptcy, or insolvency.

39-71-508. Coordination of remedies. An employee who suffers an injury arising out of and in the course of employment while working for an uninsured employer as defined in 39-71-501 or an employee's beneficiaries in injuries resulting in death may pursue all remedies concurrently, including but not limited to:

(1) a claim for benefits from the uninsured employers' fund;

(2) a damage action against the employer in accordance with 39-71-509;

(3) an independent action against an employer as provided in 39-71-515; or

(4) any other civil remedy provided by law.

39-71-509. Action against uninsured employer -- limitation of employer's defenses. If an injured employee or the employee's beneficiaries bring an action to recover damages for personal injuries sustained or for death resulting from personal injuries so sustained, it is not a defense for the employer that the:

(1) employee was negligent unless such negligence was willful;

(2) injury was caused by the negligence of a fellow employee; or

(3) employee had assumed the risks inherent in, incident to, or arising out of his employment or arising from the failure of the employer to provide and maintain a reasonably safe place to work or reasonably safe tools or appliances.

1. The full text of this and other key sections is set forth in an appendix at the end of this decision.