

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 9

WCC No. 9905-8228

DENNIS HAND

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

G. JON ROUSH, d/b/a SWITCHBACK RANCH

Employer.

ORDER DENYING MOTION FOR RECONSIDERATION

REVERSED 11/30/04

Summary: Petitioner moved for rehearing, alleging that the Uninsured Employers' Fund's (UEF's) defense based on his release of his uninsured employer was not properly raised in the Pretrial Order. He further urged that lacking a Department of Labor and Industry (Department) approval of a settlement between himself and the UEF his claim for benefits is not barred.

Held: The defense based on the release was listed as a contention and was in fact argued by the petitioner, so there is no surprise. The defense was properly considered. As to claimant's second argument, section 39-71-741, MCA (1991), is inapplicable since it did not apply to the release.

Topics:

Procedure: Pretrial Order. Where the pretrial listed a defense among the respondent's contentions, and the defense was in fact argued in the petitioner's post-trial brief, it was not error for the Court to consider the defense. The purpose of the pretrial order is to assure that the parties have notice of the issues, and the pretrial order in this case, though not perfect, gave petitioner adequate notice of the UEF's defense.

Uninsured Employers' Fund: Effect of Settlements and Releases. Where a claimant gives a comprehensive release to the uninsured employer, the effect of the release is not limited by the requirement that settlement between the UEF and the petitioner be approved by the Department. Section 39-71-741, MCA (1991), simply has no application to the release.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-741(1991). Where a claimant gives a comprehensive release to the uninsured employer, the effect of the release is not limited by the requirement that any settlement between the UEF and the petitioner be approved by the Department. Section 39-71-741, MCA (1991), simply has no application to the release.

¶1 The matter before the Court is petitioner's Petition for Rehearing and For Amendment of Findings of Fact, Conclusions of Law, and Judgment.

Discussion

¶2 In the Findings of Fact, Conclusions of Law and Judgment entered August 28, 2002, this Court dismissed the petitioner's claim for occupational disease benefits from the UEF. I found that petitioner's general and comprehensive release of the uninsured employer released the UEF from further liability to him. Petitioner challenges that ruling on two grounds.

I. Scope of Pretrial Order

¶3 The first challenge is based on the failure of the Pretrial Order to list the release as one of the issues. I requested further briefing and now determine that the issue was properly raised.

¶4 The purpose of the Pretrial Order is to set out the issues so the parties are fully aware of the issues being tried. While not stated in the issues section of the Pretrial Order, the matter was set out as one of UEF's contentions. Indeed, I note that the petitioner addressed the issue in his post-trial brief filed prior to my decision. While he argued that the issue was not properly before the Court, his argument was predicated on the failure of the UEF to appeal the Department's Initial Order of Determination. I rejected that argument in my Findings of Fact, Conclusions of Law and Judgment. He did not argue that the issue was beyond the scope of the Pretrial Order. Any claim of surprise over my having considered the effect of the release is disingenuous.

¶5 The day of hyper-technical pleading and forms of action has long passed. *King v. Zimmerman*, 266 Mont. 54, 878 P.2d 895 (1994), makes that clear. Even though *King* is directly on point, **neither** counsel bothered to cite the case. In *King* the Supreme Court rejected an argument nearly identical to the one made by petitioner herein:

The purpose of pretrial orders is to prevent surprise, simplify the issues, and permit counsel to prepare their case for trial on the basis of the pretrial order. *Zimmerman*, 854 P.2d at 342 [*Zimmerman v. Robertson* (1993), 259 Mont. 105, 854 P.2d 338]. In *Zimmerman*, under the unique facts present in that case, we held that permitting the introduction of a new factual matter which had never been raised in any of the pleadings, but rather was first raised during trial, would undermine the purposes pretrial orders are intended to serve. **Here, however, after reviewing the pretrial order, we find the defendants' arguments without merit. The pretrial order adequately sets forth all of King's contentions as contained in the initial pleadings. Furthermore, no theories were advanced at trial which had not already been well established in the pleadings. There is no basis for the defendants to claim that they were "surprised" by the issues raised and had not been able to prepare for trial.**

266 Mont. at 66, 878 P.2d at 895. I find it inexcusable that neither counsel cited *King* in their briefs and conclude that the matter at issue was properly raised in the Pretrial Order.

II. Section 39-71-741, MCA (1991).

¶16 Petitioner argues that the Court overlooked section 39-71-741, MCA (1991). He argues that this section requires all settlements to be approved by the Department and since the Department did not approve any settlement between himself and the UEF he is entitled to benefits. Initially, the argument should have been raised prior to decision. Petitioner addressed the merits of the UEF's contention that the release barred benefits and petitioner never mentioned section 39-71-741, MCA.

¶17 Moreover, the argument is without merit in any event. Section 39-71-741, MCA (1991), certainly pertains to any settlement agreement between petitioner and the UEF, but the petitioner's release of the employer was not such a settlement and was not submitted for either UEF approval or Department approval. Petitioner acted unilaterally and in doing so he prejudiced the UEF's rights to recovery against the employer; indeed, he released the UEF. Section 39-71-741, MCA (1991), is inapplicable and does not limit the release.

ORDER

¶18 The motion for a rehearing and to amend the Court's Findings of Fact, Conclusions of Law and Judgment is **denied**.

DATED in Helena, Montana, this 13th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis
Mr. Mark Cadwallader
Submitted: January 7, 2003