IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 8

WCC No. 9408-7131

DAVID CLARKE

Petitioner

vs.

SCOTT MASSEY, d/b/a ALL SEASONS CONSTRUCTION

Respondent.

ORDER AND JUDGMENT DISMISSING PETITION WITH PREJUDICE

Before the Court are cross-motions for summary judgment. Having considered the motions and the parties' arguments, the Court grants respondent Scott Massey's (Massey) motion and dismisses David Clarke's (Clarke) petition.

Factual Background

This action is a follow-up to one filed in 1991 by the respondent, Scott Massey. ***Scott Massey v. Uninsured Employers' Fund and David Clarke,*** *WCC. No. 9106-6160.* In the 1991 action, Massey sought a determination that Clarke was either an independent contractor or was acting outside the scope and course of his employment when injured on February 5, 1990. On November 12, 1991, this Court issued Findings of Fact and Conclusions of Law and Judgment, determining that Clarke was an employee of Massey. The decision directed Massey to "reimburse the Uninsured Employers' Fund for all amounts expended on the workers' compensation claim of David Clarke subject only to the limitations of section 39-71-504, MCA."

In the prior proceeding, Clarke requested an award of attorney fees against Massey. However, the request was made for the first time in proposed findings filed after trial. Massey objected to the request as outside the scope of issues specified by the pretrial order and the Court sustained the objection. (Findings of Fact and Conclusions of Law and Judgment at 3.) Neither party filed a request for a new trial or an appeal, and on February 7, 1992, the Court file in WCC No. 9106-6160 was closed.

Two years later, on March 9, 1994, the Court received Respondent's Motion for Attorney Fees. The motion requested the Court to award Clarke $3,922.50 in attorney fees incurred with respect to his defense in WCC No. 9106-6160. The Court reopened the original file.

On June 8, 1994, the Court entered an Order Denying Motion for Attorney Fees; Order Permitting the Filing of a New Petition. In that Order, the Court concluded that the previous denial of Clarke's request for attorney fees was the law of the case. Since denial of the request was premised on procedural rather than substantive grounds, the Court went on to note that the prior ruling did not necessarily preclude the filing of a new and separate petition for attorney fees. However, it declined to say whether a new petition was viable.

[T]he motion for attorney fees is **denied without prejudice.** Claimant may revise, recaption and submit the motion in the form of a petition and the Court will accept it for filing and give it a new docket number. In the event the claimant files such a petition, Massey may raise any defenses it may have, including any defenses which present an insuperable bar to the prosecution of the petition.

Once more, the Court closed the file on WCC No. 9106-6160. (Notice of Closure (July 14, 1994).)

Clarke filed his present Petition on August 25, 1994, renewing his request for attorney fees. Massey initially moved to dismiss on account of a failure to mediate the dispute. Subsequent information furnished by Clarke showed that he had requested mediation and that his request had been rejected. Massey then withdrew the motion. Massey then filed a response. Among other things, he affirmatively alleged that there is no statutory authority for an award of attorney fees. (Response to Petition, ¶ B.1.)

Following the filing of the response, Clarke moved for summary judgment, arguing that he is entitled to attorney fees as a matter of law. (Petitioner's Motion for Summary Judgment (November 15, 1994).) Massey responded with his own cross-motion for summary judgment, renewing his affirmative defense. (Respondent's Cross Motion for Summary Judgment (November 28, 1994).) Both motions are based on the pleadings. They have been briefed and are ready for decision.

Discussion

The Workers' Compensation Act contains specific provisions governing the award of attorney fees. Initially, section 39-71-515, MCA (1989), contains an attorney fee provision applicable to cases in which an injured employee brings suit against an uninsured employer. The section provides in full part:

> **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.

On its face, the attorney fee provision set out in subsection (5) applies only to actions brought pursuant to the section. Those actions may be commenced only in district court. ***Bohmer v. Uninsured Employers' Fund,*** 51 St. Rep. 824 (September 2, 1994); § 39-71-616, MCA. Thus, the section provides no authority for an award of attorney fees by this Court.

Section 39-71-611, MCA, permits this Court to award reasonable attorney fees against insurers who have unreasonably denied benefits due a claimant. It is this section which Clarke invokes in his request for attorney fees.[(1)] (Petition at ¶ 4.d. and [Petitioner's] Brief in Support of Motion for Summary Judgment).) Section 39-71-611, MCA, provides:

Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable. (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensa-tion or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

(2) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

This section has not been amended since 1987 and therefore applies to claimant's 1990 injury. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986).*

Massey argues that section 39-71-611, MCA, applies only to an insurer. An "insurer" is expressly defined under the Workers' Compensation Act as "an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3 . . . ." § 39-71-116(8), MCA. Under plan No. 1, an employer wishing to self-insure must "elect to be bound by compensation plan No. 1" and must furnish "satisfactory proof to the department of his solvency and financial ability to pay the compensation benefits provided for in this chapter." § 39-71-2101, MCA (1989). Clarke does not contend that Massey met the requirements to become a plan No. 1 self-insurer, and indeed alleges that he was uninsured. (Petition at ¶ 4.b.) Thus, Massey does not meet the statutory definition of an insurer.

Clarke contends that section 39-71-611, MCA, should nonetheless be extended to an uninsured employer. As authority he cites the maxim of jurisprudence which states, "That which ought to have been done is to be regarded as done, in favor of him to whom and against him from whom performance is due." § 1-3-220, MCA.

A maxim of jurisprudence cannot defeat a specific statutory scheme enacted by the legislature. Courts must give effect to statutes as written. They are precluded from inserting requirements or provisions omitted by the legislature. The Supreme Court has repeatedly stated that "[i]n construing a statute, courts cannot insert what has been omitted . . . ." ***Russette v. Chippewa Cree Housing Authority,*** *265 Mont. 90, 93, 874 P.2d 1217 (1994) (quoting from* ***Lester v. J & S Investment Company,*** *171 Mont. 149, 153, 557 P.2d 299, 301 (1976)*. And, where a statute is plain on its face, courts can do no more and no less than apply the statute as it is written. ***State ex rel. Neuhausen v. Nachtsheim,*** *253 Mont. 296, 299, 833 P.2d 201 (1992)*.

The legislature has made specific provision for an award of attorney fees against an insurer who has unreasonably denied liability for benefits. It has made no similar provision for an award of attorney fees against an uninsured employer. Rules of statutory construction preclude the Court from rewriting the definition of an insurer and from adding an uninsured employer to the provisions of section 39-71-611, MCA.

Clarke's motion for summary judgment is **denied.** Lacking any statutory basis for awarding attorney fees against an uninsured employer, Massey's cross-motion for summary judgment is **granted.**

JUDGMENT

The Petition filed in this matter is **dismissed with prejudice** and this Order is certified as final for purposes of appeal.

Dated in Helena, Montana, this 27th day of January, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Mark E. Jones
Ms. Kristine L. Foot

1. A companion section, § 39-71-612, MCA, permits the Court to award attorney fees in a case where the amount of benefits due a claimant is at issue. Since this case involves a denial of liability, the section would not apply in any event and is not cited by Mr. Clarke.