

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 67

WCC No. 9906-8255

JACK SEGER

Petitioner

vs.

MAGNUM OIL, INCORPORATED

Respondent/Insurer/Employer.

ORDER DENYING MOTION TO DISMISS

Summary: Respondent self-insured employer moved to dismiss injured worker's claim that employer failed to honor his reemployment preference under section 39-71-317, MCA (1999). Respondent argued WCC did not have jurisdiction and that application of 1999 statute conferring jurisdiction amounted to improper retroactive application of new law.

Held: Motion to dismiss denied. Section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-317, MCA (1999). Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change

in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Jurisdiction: Original Jurisdiction. Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Reemployment Preference: Jurisdiction. Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Reemployment Preference: Jury Trial. Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Statutes and Statutory Interpretation: Procedural. Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference

under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

Statutes and Statutory Interpretation: Retroactive (defined). A statute does not operate "retroactively" merely because it is applied in a case arising from conduct antedating the statute's enactment. *Porter v. Galarneau*, 275 Mont. 174, 183, 911 P.2d 1143, 1148-1149 (1996); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229. The Montana Supreme Court has defined a "retroactive law" to be "one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions already passed." *Continental Oil. Co. v. Montana Concrete Co.*, 63 Mont. 223, 207 P.2d 116; *Wallace v. Dept. of Fish, Wildlife and Parks*, 269 Mont. 364, 889 P.2d 817 (1995). In *St. Vincent Hospital v. Blue Cross*, 261 Mont. 56, 862 P.2d 6, 9 (1993), the Montana Supreme Court stated that a "retroactive law" is one which gives a "transaction a different legal effect from that which it had under the law when it occurred."

Statutes and Statutory Interpretation: Retroactivity. Self-insured employer's motion to dismiss injured worker's claim for denial of reemployment preference under section 39-71-317, MCA (1999) denied. Although employer argued WCC lacked jurisdiction, section 39-71-317, MCA (1999) gives the WCC "exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference." Even though claimant's injury occurred prior to passage of the 1999 statute, the WCC has jurisdiction where precedent indicates legislatures may change the forum for resolution of pending disputes without enacting a "retroactive" law. Although the WCC was initially concerned the change in jurisdiction may impact an accrued substantive right to jury trial, further consideration indicates the reemployment preference is a creation of statute to which no right to jury trial attached.

¶1 Petitioner in this matter alleges that respondent, his former employer, failed to honor his reemployment preference under section 39-71-317, MCA. The respondent/employer moves to dismiss for lack of jurisdiction. (Motion to Dismiss for Lack of Jurisdiction.)

Factual Background

¶12 The jurisdictional facts are found in the pleadings and the parties' briefs. The parties agree that claimant worked as a laborer for respondent and suffered a compensable injury on or about July 28, 1998. They agree he was released to return to work on or about August 26, 1998. They disagree whether respondent refused to offer claimant work in violation of section 39-71-317, MCA. Claimant alleges he made multiple inquiries about employment but was told no work was available to him. He further claims that respondent "has hired other individuals into positions which are consistent with plaintiff's physical condition and vocational abilities, thereby, failing to give the plaintiff a preference as required by 39-71-317(2) MCA." (Complaint Pursuant to 39-71-317(2) MCA at 2.)

¶13 The relief requested by claimant includes "reasonable damages, attorney fees and costs." (*Id.*) He also requests "punitive damages in an amount sufficient to punish defendant for its intentional violation of public policy." (*Id.*)

Discussion

¶14 The 1999 Legislature amended section 39-71-317, MCA, to give the Workers' Compensation Court jurisdiction over the employment preference provided for in the section. (1999 Mont. Laws, ch. 42, sec. 13.) As amended, the section provides:

39-71-317. Employer not to terminate worker for filing claim - preference - jurisdiction over dispute. (1) An employer may not use as grounds for terminating a worker the filing of a claim under chapter 72 or this chapter. The district court has exclusive jurisdiction over disputes concerning the grounds for termination under this section.

(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.*** [Bolded italics added for emphasis.]

The section was effective upon passage and approval. (*Id.*, § 29 and see §§ 30 and 31.) Thus, it was effective April 23, 1999.

¶5 Subsection (4) grants this Court jurisdiction "to administer or resolve a dispute concerning the reemployment preference under this section." The focus of the Court's authority is to determine whether, on the facts of each case presented, an employer must give the reemployment preference. In most cases, it is likely that by the time the dispute reaches this Court, the controversy will be whether the employer *should have* hired claimant for a particular job or jobs. Many cases will require the Court to determine the worker's physical condition and vocational abilities, issues routinely considered by this Court.

I.

¶6 Respondent argues that despite the express delegation of jurisdiction under the 1999 version of section 39-71-317, MCA, this Court nonetheless lacks jurisdiction over the controversy because it is not within the general jurisdiction conferred under section 39-71-2905, MCA (1999). (Supplemental Brief in Support of Motion to Dismiss for Lack of Jurisdiction at 3.) The argument is without merit.

¶7 Section 39-71-2905(1), MCA, provides in relevant part that:

[a]fter parties have satisfied dispute resolution requirements provided elsewhere in this chapter, the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under chapter 71, **except as provided in 39-71-317** and 39-71-516.

Even if section 39-71-2905, MCA, could be read as omitting disputes involving the preference from this Court's jurisdiction, section 39-71-317(4), MCA (1999), is the more recent and specific statute and must prevail in case of any conflict. "[W]hen two statutes deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite statute will prevail to the extent of any opposition between them." *Smith v. State, Driver's Imp. Bureau*, 288 Mont. 383, 389, 958 P.2d 677, 681. "Where differences between statutes exist, the earlier statute may be impliedly repealed by the later one if they are 'plainly and irreconcilably repugnant to or in conflict with each other.'" *Burnt Fork Citizens Coalition v. Board of County Com'rs of Ravalli County*, 287 Mont. 43, 49, 951 P.2d 1020, 1024 (1997). Moreover, there is no conflict. Under section 39-71-2905, MCA, the Court has jurisdiction over disputes arising under chapter 71, which includes the preference, "except as provided in 39-71-317" Section 39-71-317, MCA, however, expressly provides for Workers' Compensation Court jurisdiction over disputes involving the rehiring preference.

¶8 Respondent's contention that the Court's jurisdiction is limited to disputes concerning benefits is simply wrong. Over the years, the legislature has expanded the Court's jurisdiction to encompass matters other than benefits. A full reading of the Workers' Compensation Act reveals that the Court is not simply an administrative law court

functioning under the executive branch of government but is a special court created pursuant to Article 7, section 1 of the 1972 Montana Constitution.⁽¹⁾

While attached to an executive agency (the Department of Labor and Industry), the attachment is "for administrative purposes only," § 2-15-1707(1), MCA, and the Court otherwise operates independently of the executive branch. The judge of the Court must have the same qualifications as district judges, *id.* at subsec. (3), is appointed by the Governor in the same manner as appointments are made to the district courts and the Supreme Court, *id.* at subsec. (2), and is subject to confirmation by the Senate, § 3-1-1013, MCA. The Court has contempt powers equivalent to those of a district court, § 39-71-2901(e), MCA; it may issue executions and other orders to enforce its judgments in the same manner as district courts, § 39-71-2901(c), MCA; it acts as a first level appellate court in the same manner as district courts, conducting judicial review of agency decisions of the Department of Labor and Industry, § 39-71-2401(3), MCA; its decisions are governed by the same rules of evidence applicable to district court proceedings, § 39-71-2903, MCA; appeals from its decisions are directly to the Supreme Court in the same manner as appeals from district courts, § 39-71-2904, MCA; it routinely confronts and decides constitutional issues, see *e.g.*, *Henry v. State Compensation Ins. Fund*, 1998 MTWCC 42, reversed on appeal, 1999 MT 126, and *Connery v. Liberty Northwest Ins. Co.*, Decision and Judgment, WCC No. 9702-7703 (Sept. 4, 1997), *aff'd* on appeal 1998 MT 125; its jurisdiction now encompasses other issues not strictly involving benefits, including the amount of benefits recoverable against an uninsured employer in a district court action against the employer, § 39-71-516, MCA, imposition of civil penalties involving workers' compensation related matters, §§ 39-71-304(1), -315, and -316(3), MCA (1999), and judicial review of classification decisions for premium purposes which are made by the Classification Review Committee under the Insurance Code, § 33-16-1012 (2)(c), MCA; and so on.

¶9 It is thus clear that the 1999 Legislature intended to give the Workers' Compensation Court jurisdiction over disputes arising with respect to the reemployment preference. The only remaining question is whether the 1999 legislation is applicable to reemployment preference disputes arising prior to the effective date of the 1999 legislation.

II.

¶10 Respondent argues that application of the jurisdictional amendment would amount to a retroactive application of law and that the legislature did not provide for such retroactive application. It relies upon section 1-2-109, MCA, which codifies a long-standing canon of statutory construction as follows:

No law contained in any of the statutes of Montana is retroactive unless expressly so declared.

¶11 Initially, neither claimant nor this Court disagrees with the general rule, applicable in workers' compensation cases, that the law in effect on the date of injury establishes a claimant's **right to benefits and substantive matters**. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986) (emphasis added). However, that rule, as shown by the emphasized language, does not apply to application of a procedural amendment to cases arising prior to the amendment. Changes in the law which merely affect procedure are not retroactive laws within the meaning of section 1-2-109, MCA, or *Buckman* when applied to preexisting claims.

¶12 In *Porter v. Galarneau*, 275 Mont. 174, 183, 911 P.2d 1143, 1148-49 (1996), the Montana Supreme Court explained what is meant by a retroactive application of law:

We will first address the canon which is codified in Montana at § 1-2-109, MCA, which provides that a statute is not retroactive unless expressly so declared. **A statute does not operate "retroactively" merely because it is applied in a case arising from conduct antedating the statute's enactment.** *Landgraf v. USI Film Prods.* (1994), 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229. **This Court has defined a "retroactive law" to be "one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed."** *Continental Oil Co. v. Montana Concrete Co.* (1922), 63 Mont. 223, 207 P. 116; *Wallace v. Dept. of Fish, Wildlife and Parks* (1995), 269 Mont. 364, 889 P.2d 817. **In *St. Vincent Hospital v. Blue Cross* (1993), 261 Mont. 56, 862 P.2d 6, we stated that a "retroactive law" was one which gave a "transaction a different legal effect from that which it had under the law when it occurred."** *St. Vincent Hosp.*, 862 P.2d at 9. [Emphasis added.]

The Supreme Court has applied the distinction with respect to changes in workers' compensation laws and repeatedly found that jurisdictional changes - i.e., changes substituting one dispute resolution forum for another - are procedural and apply to all cases, including cases which arose prior to the changes.

¶13 The mother of all cases is *State Compensation Ins. Fund v. Sky Country, Inc.*, 239 Mont. 376, 780 P.2d 1135 (1989) (*Sky Country*). That case involved section 39-71-415(1), MCA (1987), which shifted jurisdiction to resolve independent contractor disputes from the Division of Workers' Compensation to the Appeals Bureau of the Department of Labor & Industry. Under the prior statutory scheme, the Workers' Compensation Court heard appeals from the Division of Workers' Compensation. In *Sky Country, Inc.*, the Supreme Court held that the change in jurisdiction should have been given immediate effect, thus the case should have been transferred to the Appeals Bureau. In so ruling, the Supreme Court rejected the argument that transfer of a pending case, which arose prior to the

statutory change, violated provisions against retroactive application of new laws.
According to the Court:

Section 1-2-109, MCA, provides that "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared." New legislation, such as in this case, which affects only procedural matters and does not relate to substantive rights of the parties does not fall within the ambit of § 1-2-109, MCA. *Weiss v. State* (1986), 219 Mont. 447, 449, 712 P.2d 1315, 1316.

239 Mont. at 379, 780 P.2d at 1137.

¶14 *Wolfe v. Webb*, 251 Mont. 217, 824 P.2d 240 (1992) and *Martin v. State Compensation Ins. Fund*, 275 Mont. 190, 194, 911 P.2d 848, 850 (1996) both involved expansion of the Workers' Compensation Court's jurisdiction and are even more to the point. Both involved the Court's authority to set aside settlement agreements. At the time of the claimant's injury in *Wolfe*, section 39-71-2909, MCA (1985), appeared to preclude the Worker's Compensation Court from setting aside full and final compromise settlement agreements. However, when the matter was tried, the statute had been amended to remove any such limitation. The Supreme Court held that the amendment applied to cases arising prior to the amendment. It characterized the jurisdictional change as procedural:

Whether the decision to set aside that agreement is made in this Court or the Workers' Compensation Court is merely a procedural difference and does not effect the substantive rights of either party. Therefore, the amendment to the workers' compensation statutes which eliminated any restriction on that court's authority to review and rescind compromise settlement agreements was a change in the procedural law. We have previously held that procedural rules in effect at the time that a case proceeds to trial are the rules that are to be applied to the resolution of that dispute. [Citations omitted.]

Wolfe, 251 Mont. at 226-27, 824 P.2d at 245-6. Applying *Wolfe*, the Court in *Martin v. State Compensation Ins. Fund* held that the Workers' Compensation Court had jurisdiction to set aside final settlement agreements in cases arising prior to the statutory change.

¶15 Although not in the context of workers' compensation proceedings, the Supreme Court of the United States has reached the same conclusion about the "procedural" nature of changes in jurisdiction. In *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Court explained: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." According to the Court:

Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties. ...'

Id. at 274. It went on to say:

Because rules of procedure regulate **secondary rather than primary conduct**, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

Id. at 275 (emphasis added).

III.

¶16 The foregoing discussion would appear to dispose of respondent's arguments but for one thing, that being the possibility that a right to jury trial attached to disputes under the preference statute prior to its amendment. The Workers' Compensation Court does not have statutory authority to impanel juries. Moreover, being a statewide Court which sits in several cities and makes special arrangements for courtrooms, it would be virtually impossible for the Workers' Compensation Court to hold jury trials. Thus, it is clear that in transferring the jurisdiction to this Court, the legislature intended preference disputes be determined by this Court sitting without a jury.

¶17 The importance of jury trials in our system of jurisprudence needs no lengthy explanation. Jury trials are of sufficient importance that both the Montana and United States constitutions guarantee the right. U.S. Const. Amend. VII;⁽²⁾ 1972 Mont. Const. Art. II, § 26.⁽³⁾

I considered the possibility that the right of jury trial, if there was one under the pre-1999 preference statute, might be a substantive right which might render the 1999 amendment a substantive change, hence the usual rule of *Buckman* might apply. I therefore asked the parties to provide supplemental briefs addressing whether there was a right to jury trial under section 39-71-317, MCA, prior to the 1999 amendment.

¶18 Having considered the supplemental briefs, the cases cited therein, and cases identified in the Court's own research, I find that prior to its amendment in 1999 section 39-71-317, MCA, did not provide a right to jury trial. I therefore conclude that the transfer of jurisdiction from the district courts to the Workers' Compensation Court was a procedural change not affecting the substantive rights of the parties and that this Court therefore has jurisdiction over disputes arising prior to the 1999 amendment.

¶19 In arguing that a right to jury trial is provided by section 39-71-317, MCA, respondent contends that the statute establishes a civil cause of action implicating the full range of common law damages and, therefore, implicating a right to jury trial. The contention is without merit. The section simply creates a preference for reemployment. § 39-71-317(2), MCA. It says nothing about damages or any other remedy.

¶20 The preference is a statutory creation. While the legislature has the power to create statutory rights enforceable through jury trial and the award of common law damages, it

also has the authority to establish rights and obligations enforceable through non-jury adjudication. Indeed, the entire workers' compensation system, which replaced common law negligence claims against employers, is a classic example. Courts throughout the United States long ago recognized that workers' compensation acts are not invalid by their denial of jury trial to employers or employees who come within the scope of their provisions. See, e.g., *State ex. Rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101, 1119 (1911); *Metropolitan Casualty Co. of New York v. Huhn*, 165 Ga. 667, 142 S.E. 121 (1928).

¶21 The Montana Supreme Court has recognized that the constitutional right of a jury trial does not necessarily extend to the adjudication of legislatively created rights and obligations. An early case was *In re Valley Center Drain District*, 64 Mont. 545, 211 P. 218 (1922), involving statutory procedures for creation of drain districts and imposition of assessments on landowners. Because the statutory process involved determination of some issues by commission, landowners argued that they were denied their right to jury trial. The Court rejected the argument:

The proceeding by which a drain district is created and managed is purely statutory. It is not an ordinary civil action, but a special proceeding [citation omitted], in which the right to a jury trial did not exist at the time our Constitution was adopted [citation omitted]. Hence the right of trial by jury as guaranteed by the Constitution is not impaired.

64 Mont. at 551, 211 P.2d at 221.

¶22 More recently, in *Romero v. J & J Tire*, 238 Mont. 146, 151, 777 P.2d 292, 295 (1989), the Supreme Court addressed whether the Montana Human Rights Act violated the United States or Montana Constitutions by providing a hearing before the Human Rights Commission rather than a jury trial. Noting that "the right to trial by jury in this state is the same as that guaranteed by the Seventh Amendment to the United States Constitution," the Court looked to federal precedent and adopted the rule of *Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442, 455, 97 S.Ct. 1261, 1269, 51 L.Ed.2d 464, 475 (1977):

When Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law."

238 Mont. at 151, 777 P.2d at 296. The *Romero* decision was followed in *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993), which held the Human Rights Act procedures for an administrative hearing with respect to claims of sexual harassment did not deny defendant's right to jury trial.

¶23 In *Romero* and *Vainio*, the Supreme Court analogized the adjudication of Montana human rights cases to federal claims under Title VII of the Civil Rights Act of 1964. Prior to the passage of the Civil Rights Act of 1991, in which Congress decided to allow jury trial on claims for compensatory and punitive damages in Title VII actions, trial judges found facts and made orders for back pay and other restitution in Title VII cases. Non-jury resolution was upheld by the federal courts, despite the argument that awards of back pay and lost employment benefits were essentially common law damages, requiring jury adjudication. In *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975), the Court noted that "not all awards of monetary relief should necessarily be characterized as legal relief for purposes of the jury trial requirement." The Court explained:

Appellants' claim that a jury trial must be afforded whenever any "legal" characteristic is associated with a primarily "equitable" action fails. Here, the award of back pay is an integral part of the equitable remedy of reinstatement (see, *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 421-425, 95 S.Ct. 2362, 45 L.Ed.2d 280); to consider it apart from that context would be to distort the traditional line dividing legal from equitable remedies.

522 F.2d at 1094; see also, *EEOC v. Detroit Edison* 515 F.2d 301, 308 (6th Cir. 1975). *Sparrow v. C.I.R.*, 949 F.2d 434 (D.C. Cir. 1991), reached the same conclusion with regard to the nature of Title VII damages. The Court noted that

in the seventh amendment context, the distinction between the legal remedy of damages and the equitable remedy of restitution has been consistently maintained.

949 F.2d at 438.

¶24 In other analogous contexts, the United States Supreme Court has upheld administrative mechanisms for resolving statutory claims against employers, including awards of back pay and/or penalties. In *Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442, 51 L.Ed.2d 464, 97 S.Ct. 1261 (1977), which the Montana Supreme Court relied upon in *Romero*, the Court considered penalties imposed by administrative law judges under the federal Occupational Safety and Health Act. The Supreme Court found:

[H]istory and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved. Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh

Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.

430 U.S. at 461.

¶25 In an earlier case, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615 (1936), the United States Supreme Court addressed whether the Seventh Amendment prevented Congress from committing fact-finding and remedial functions to the National Labor Relations Board for certain issues arising under the National Labor Relations Act. Specifically addressing the litigation of unfair labor practices involving an award of reinstatement and back pay, the Court explained:

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. *It is a statutory proceeding.* Reinstatement of the employee and payment for time lost *are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.* The contention under the Seventh Amendment is without merit. [Emphasis added.]

301 U.S. at 48-49.

¶26 As in the cases referenced above, the present matter involves a legislatively created right and remedy. A claim under section 39-71-317(2), MCA, is not akin to a common law claim for damages. Borrowing the words of the Court in *NLRB v. Jones & Laughlin Steel Corp.*, a proceeding to enforce the preference "is one unknown to the common law. *It is a statutory proceeding.*" 301 U.S. at 48.

¶27 The fact that awards under the section might involve monetary awards in the nature of back pay does not change the nature of the statutory right nor require a jury trial. Section 39-71-317, MCA, both before and after the 1999 amendments merely provided a preference. It did not provide a right to damages or any other specific relief. On the other hand, it did and does provide a forum for resolution of disputes involving the preference. In providing a forum, it is fair to assume that the legislature intended to provide a mechanism to enforce the preference. Damages or back pay may be one form of enforcement, but equitable relief is also another, obvious form of relief.

¶28 In support of its argument that jury trial was available under the earlier statute, respondent cites *Galbreath v. Golden Sunlight Mines, Inc.*, 270 Mont. 19, 890 P.2d 382 (1995). In *Galbreath*, allegations under section 39-71-317(2), MCA, indeed appear to have reached a jury, but the decision does not consider or discuss whether a right to jury trial exists under the section. Unlike the present matter, *Galbreath* was primarily a lawsuit for wrongful discharge. As summarized by the Supreme Court, *Galbreath's* claims included the following:

(1) that he had been terminated without good cause under Montana's Wrongful Discharge from Employment Act, § 39-2-901, MCA; (2) that his termination violated § 39-71-317, MCA, which prohibits employers from terminating workers for filing workers' compensation claims and requires employers to give job preference to employees returning to work after an industrial accident; (3) that his termination and its relationship to his workers' compensation claim violated Montana's Unfair Trade Practices Act, § 33-18-201, MCA; and (4) that all of the defendants acted fraudulently, oppressively, and maliciously in violation of Montana's Punitive Damages Act, § 27-1-221, MCA.

Galbreath, 270 Mont. at 21-22, 890 P.2d at 384.

¶29 Admittedly, prior to the 1999 amendment, the district court had jurisdiction over preference claims arising under section 39-71-317, MCA. But granting the district courts jurisdiction to resolve such disputes does not mean that a right to jury trial exists. In *Supola v. Montana Dept. of Justice*, 278 Mont. 421, 925 P.2d 480 (1996), the Montana Supreme Court explained:

The inviolate right to a jury trial is not a prospective one, automatically granted in every new proceeding which may arise. **Rather, the right which is constitutionally preserved is that right to a jury trial which existed at the time the constitution was enacted. In other words, "the rule in Montana is that our state constitution only guarantees the right to a jury trial in the class of cases in which the right was enjoyed when the constitution was adopted."** *Matter of C.L.A.*, 685 P.2d at 933.

278 Mont. at 424-25, 925 P.2d at 482 (emphasis added). Numerous courts apply the rule that "no right to trial by jury attaches to an action for a statutory remedy unless the statute so provides or the statutory remedy is a codification of a common law remedy." *Fairbanks North Star v. Duncan*, 878 P.2d 641, 641 (Alaska 1994); see also, *Skinner v. Angliker*, 211 Conn. 370, 559 A.2d 701, 703 (1989) (right to jury trial extends to statutory proceedings if issues were triable to a jury prior to enactment of constitutional provision); *Abbamont v. Piscataway Township Bd. of Educ.*, 238 N.J.Super. 603, 605, 570 A.2d 479, 480-81 (1990) (no right to jury trial where statute does not provide right and the "statutory cause of action is separate and distinct from common law causes of action."); *Murphy v. Cartex Corp.*, 377 Pa.Super. 181, 546 A.2d 1217, 1222 (1988) ("Jury trials are not available in proceedings created by statute unless the proceeding has a common law basis or unless the statute expressly or impliedly so provides."); *Jensens v. State Tax Comm'n.*, 835 P.2d 965, 969 (Utah 1992) (no right to jury trial where procedures "are solely creatures of statute and were not cognizable as civil actions at common law.") This Court is not aware of any common law preference for reemployment following a workers' compensation injury.

¶30 The reemployment preference guaranteed in section 39-71-317(2), MCA, was adopted by the 1987 legislature as a part of a comprehensive revision of the Workers' Compensation Act. 1987 Montana Laws, ch. 464.⁽⁴⁾ One individual submitting written testimony commented that the preference furthered the overall purpose of returning the injured worker to work. (Ex. 13, Senate Labor & Employment Committee, February 14, 1987 Hearing.) That comment is persuasive as to the intent of the provision.⁽⁵⁾

¶31 However, the Court has reviewed the legislative history, which is voluminous, and finds no discussion regarding either any right to jury trial or remedies for violations of the guarantee. There is a comment by the then Administrator of the Workers' Compensation Division that retaliatory termination (§ 39-71-317(1), MCA) and the rehiring preference (§ 39-71-317(2), MCA) were not "within the purview of the WC court and would be handled in district court." (Minutes of Workers' Compensation Subcommittee, March 18, 1987, page 4.) The statement was accurate. At that time, the jurisdictional provisions of the Workers' Compensation Court were principally confined to benefit matters and would not have encompassed either subject. At that time -- 1987 -- there was no discussion of expanding the jurisdiction of the Worker's Compensation Court. The comment falls far short of indicating a legislative intent to grant a right to jury trial with respect to the preference.

¶32 Accordingly, I find that even prior to the 1999 amendment of section 39-71-317, MCA, there was no right to jury trial, that the change in jurisdiction over disputes arising under section 39-71-317(2), MCA, is merely a procedural change not affecting substantive rights, and that this Court has jurisdiction over the petition herein.

¶33 Although not discussed in briefing by the parties, the petitioner's complaint also alleges "retaliatory termination of employment for the filing of his workers' compensation claim." (*Id.* ¶ 8.) This allegation is plainly beyond the jurisdiction of the Workers' Compensation Court. § 39-71-317(1), MCA. Wrongful discharge actions must be brought in district court.

ORDER

¶34 1. Allegations of retaliatory dismissal contained within paragraphs 7 and 8 of the complaint are **stricken**.

¶35 2. The motion to dismiss for lack of jurisdiction is **denied**.

DATED in Helena, Montana, this 29th day of October, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. William Dean Blackaby
Mr. Todd A. Hammer
Date Submitted: August 2, 1999

1. The section provides:

Section 1. Judicial power. The judicial power of the state is vested in one supreme court, district courts, justice courts, **and such other courts as may be provided by law.** [Emphasis added.]

2. Amendment VII (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

3. Section 26. Trial by jury

The right of trial by jury is secured to all and shall remain inviolate. But upon default of appearance or by consent of the parties expressed in such manner as the law may provide, all cases may be tried without a jury or before fewer than the number of jurors provided by law. In all civil actions, two-thirds of the jury may render a verdict, and a verdict so rendered shall have the same force and effect as if all had concurred therein. In all criminal actions, the verdict shall be unanimous.

4. The preference is found in section 20 of chapter 484.

5. The overall purpose of the Act is set out in section 39-71-105, MCA, which is entitled a "Declaration of public policy." Subsection (2) provides:

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.