IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 34

WCC No. 2000-0041

AUBREY SCHNEIDER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

JOEL BOS, d/b/a BOS TOP DAIRY

Employer.

ORDER DENYING MOTION TO AMEND OR RECONSIDER

Summary of Case: The insurer in this case accepted liability for a claim but later cut off benefits. Claimant petitioned for reinstatement of benefits. Although the insurer urged in its responsive pleading and the Pretrial Order that claimant was not injured in an industrial accident and it was not liable for further benefits, it did not seek repayment of benefits already dispensed. The Court found that the claimant was not truthful and was not in fact injured at work. Thereafter, the insurer moved to amend its pleadings to assert a counterclaim for repayment and amend the Court's decision to award repayment.

Held: The motion is denied. Even though the Court looks to Rule 15(b) of the Mont.R.Civ.P., which allows for liberal amendment of pleadings to conform to evidence presented at trial, that rule does not countenance the post-trial injection of a counterclaim for damages.

Topics:

Pleading: Counterclaims. While the Workers' Compensation Court adopts Rule 15(b), Mont.R.Civ.P., which allows for amendments to pleadings to conform to the evidence presented at trial, the Rule does not allow for injection of a counterclaim which has not previously been pled.

Procedure: Post-Trial Proceedings: Amendments to Findings. While the Workers' Compensation Court adopts Rule 15(b), Mont.R.Civ.P., which allows for amendments to pleadings to conform to the evidence presented at trial, the Rule does not allow for injection of a counterclaim which has not previously been pled.

Post-trial request to amend pleadings and amend decision to award judgment on the belated counterclaim is denied.

Workers' Compensation Court Rules: Incorporation of Rules of Civil Procedure. Pursuant to WCC Rule 24.5.352(1), the WCC adopts Rule 15(b), Mont.R.Civ.P., which governs amendment of pleadings at and after trial.

Montana Rules of Civil Procedure: Rule 15(b). Pursuant to WCC Rule 24.5.352(1), the WCC adopts Rule 15(b), Mont.R.Civ.P., which governs amendment of pleadings at and after trial.

¶1 In this Court's Findings of Fact, Conclusions of Law and Judgment, I found that claimant did not suffer an industrial accident as he claimed. I denied his request for further benefits and ordered him to repay 49 days of benefits which had been paid to him pursuant to section 39-71-610, MCA. Respondent (Liberty) now moves to amend its pleadings to add a counterclaim for reimbursement of other benefits it has paid claimant to date and to amend the Court's decision to order claimant to repay those benefits.

Discussion

¶2 Liberty cites Rule 15(b), Mont.R.Civ.P., as authority for its request. The rule provides:

> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

While the Montana Rules of Civil Procedure do not directly apply to the Workers' Compensation Court, the Court will apply those rules when its own rules are silent on a matter and the rules are not inconsistent with the purpose and nature of the proceedings in this Court: Rule 24.5.352(1) of this Court's rules provides:

> (1) If no express provision is made in these rules regarding a matter of procedure, the court will be guided, where appropriate, by considerations and procedures set forth in the Mont.R.Civ.P.

In light of the expedited nature of proceedings in this Court and the numerous requirements for full and fair disclosure of the parties' contentions and evidence, I find it appropriate to apply Rule 15(b), Mont.R.Civ.P. However, I further find that Liberty's requests to amend its pleadings and the final decision should be denied under the Rule 15(b), Mont.R.Civ.P.

¶3 What Liberty seeks to do by its proposed amendments is to assert a new counter-claim against the claimant and recover on that counterclaim. Counterclaims must be set forth in the responsive pleading. Rule 13, Mont.R.Civ.P. In this case, there was no mention of any request for affirmative relief against claimant until after the Court issued its decision.

¶4 Liberty has cited no case which has allowed the addition of a counterclaim after trial where no counterclaim was pleaded in the response. The addition of a counterclaim is very different from an amendment to a theory supporting a claim for relief already made, or an amendment to specific relief already requested.

¶5 McJunkin v. Kaufman and Broad Home Systems, Inc., 229 Mont. 432, 437, 748 P.2d 910, 913 (1987), is cited by Liberty for the proposition that "[t]he failure to set forth all claims is not fatal." (Motion to Amend, Motion to Reconsider and Supporting Brief at 2.) But a careful reading of *McJunkin* undermines Liberty's contention. In that case, the district court refused to allow an amendment to add a new theory to the case. The Supreme Court affirmed on appeal, saying, "However, liberal construction and amendment of pleadings does not grant counsel carte blanche to advance new theories on an unsuspecting opponent." *Id.* Quoting from *Brothers v. Surplus Tractor Parts Corp.,* 161 Mont. 412, 417-418, 506 P.2d 1362, 1365(1973), the Supreme Court noted:

> It is generally accepted that the appellant cannot recover beyond the case stated by him in his complaint. . . . This Court believes that fair notice to the other party remains essential, and pleadings will not be deemed amended to conform to the evidence because of "*implied consent*" where the circumstances were such that the other party was not put on notice that a new issues was being raised. . . . (Citations omitted.)
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> Rule 15(b), M.R.Civ.P. should be applied liberally to avoid the old requirements of formalism and to allow litigants to proceed efficiently on the merits of the case. However, leave to amend pleading under Rule 15(b), cannot be granted arbitrarily or perfunctorily because the result would create a question of due process in cases where the defendant may not have an adequate opportunity to prepare his case on the new issues raised by the amended pleading, therefore the facts attendant to each case become controlling. (Citations omitted.)

Id. at 437-38, 748 P.2d at 913-14. The case involved a mobile home, which the purchasers alleged was defective. The district court declined to submit a breach of express warranty claim to the jury and the Supreme Court affirmed, holding:

> As noted above, the purpose of pleading is to provide notice. See *Conley,* supra. The McJunkins had two and one-half years to amend their complaint. In addition, the pretrial order signed by the parties specifically states that the express warranty claim applied only to K & B. Under these facts, we cannot say the District Court clearly abused its discretion. We hold that the District Court properly refused to submit the issue to the jury.

Id. at 438, 748 P.2d at 914. In this case, the Court was the jury since this was a bench trial, yet the counterclaim was never presented to me until after the trial was complete and my decision was filed.

¶6 Liberty also cites *Butte Teachers' Union Local No. 332, AFL-CIO v. Board of Trustees of Butte School Dist. No. 1 of Silver Bow County,* 201 Mont. 482, 655 P.2d 146 (1982), for the proposition that "[i]ssues not raised by the pleadings may be tried by the express or implied consent of the parties." (Motion to Amend, Motion to Reconsider and Supporting Brief at 2.) There, the district court granted a motion for summary judgment for the school district based upon evidence of a waiver of a collective bargaining agreement. The Supreme Court reversed the grant of summary judgment because waiver had never been pled:

> Rule 8(c), M.R.Civ.P., requires that the defense of waiver be affirmatively plead. Here, waiver was neither plead in the school district's answer or raised by a subsequent motion or cross-motion for summary judgment. Cf. *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, (9th Cir.1950), 185 F.2d 196, 205, cert. den. 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680, cited in *Rambur v. Diehl Lumber Co. Inc.* (1964), 144 Mont. 84, 90, 394 P.2d 745, 749. Allegations of waiver were in the first instance presented to the District Court via a memorandum and supporting affidavit in opposition to the Union's motion for summary judgment.
>
> Additionally, at no time did the Union join in the waiver issue. Before the district and appellate courts, the Union has maintained its objection to the school district's allegations of waiver as being violative of the parol evidence rule. Therefore, it cannot be said that an issue not raised by the pleadings was tried by the express or implied consent of the parties, as Rule 15(b), M.R.Civ.P. would permit. Cf. *Reilly v. Maw* (1965), 146 Mont. 145, 405 P.2d 440, wherein implied consent was found on the basis that evidence extrinsic to the claim plead, was admitted at trial without objection. Without an issue regarding waiver, a large portion of Milligan's affidavit is inadmissible simply because it is irrelevant to the question of whether the school district has a duty to pay unused sick leave to retired and retiring teachers under the terms of the collective bargaining agreement and the Driscoll opinion.

201 Mont. at 486-87, 655 P.2d at 148.

¶7 While it might be argued that in this case "implied consent" existed to a counterclaim based on fraud in this case, I find that it did not. Acquiescing to presentation of evidence in support of a defense to payment of further benefits is not the same thing as acquiescing to a presentation of a monetary counterclaim. Where a counterclaim for repayment of benefits is asserted, the stakes for the claimant are far greater than a mere denial of a request for further benefits. The increased stakes could have affected litigation strategy.

¶8 Liberty cites *Keaster v. Bozik,* 191 Mont. 293, 623 P.2d 1376 (1981), as supporting this Court's authority to amend and the exercise of that authority to amend in this case. (Motion to Amend, Motion to Reconsider and Supporting Brief at 3.) *Keaster* was tried to the Court without jury and during the trial the Court allowed the plaintiff to amend its complaint to allege damages for loss of use of property. Citing the district court's discretion to allow such an amendment pursuant to Rule 15(b), Mont.R.Civ.P, the Court affirmed. However, in doing so, the Supreme Court pointed out, "The amendment sought by the Keasters during trial did not change the theory of liability or affect the entire complexion of the lawsuit . . . ." *Id*. at 298, 623 P.2d at 1379. In this case, fraud underlies both the defense to further benefits and a counterclaim for repayment of benefits, however, a counterclaim fundamentally changes the "complexion of the lawsuit."

¶9 *Brothers v. Surplus Tractor Parts Corp.,* 161 Mont. 412, 506 P.2d 1362 (1973), states the general proposition that Rule 15(b), Mont.R.Civ.P, should be liberally applied "to avoid the old requirements of formalism and to allow litigants to proceed efficiently on the merits of the case." *Id*. at 418, 623 P.2d at 1365. However, Liberty overlooks the case's citation to previous authority holding, **"It is generally accepted that the appellant cannot recover beyond the case stated by him in his complaint."** *Id*. at 417, 623 P.2d at 1365 (quoting *Gallatin Trust and Savings Bank v. Darrah*, 152 Mont. 256, 261, 448 P.2d 734, 737 (1968). (Emphasis added.)

ORDER

¶10 The motion is **denied**.

DATED in Helena, Montana, this 19th day of June, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: May 29, 2001