IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 50

WCC No. 2002-0553

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

BIG SKY PETROLEUM, INCORPORATED

Employer/Respondent

and

MONTANA STATE FUND

Potential Insurer

and

MELVIN STRONG

Employee/Claimant.

DECISION AND ORDER DENYING MOTION TO DISMISS

AND COMPELLING DISCOVERY

Summary: UEF seeks indemnification from the Montana State Fund. One of its theories for recovery is that even if the Montana State Fund did not insure the employer at the time of the claimant's industrial accident, its acceptance of the claim based on the employer's report of the accident occurring while a policy was in effect precludes it from later, unilaterally terminating claimant's benefits. The Montana State Fund moves to dismiss for failure to state a claim.

Held: While the Court questions the standing of the UEF to assert the theory, and while it is doubtful the theory is viable in any event, because the theory presents an issue of first impression, the Court finds it better to defer the issue and develop a full factual record, especially since the questions raised by the Court about the theory have not been fully briefed. Moreover, a full factual record will avoid a new trial in the event of an appeal and reversal.

Topics:

Procedure: Motion to Dismiss. Where issue is of first impression and may be subject to an appeal, the Court may allow discovery and trial of the issue even if skeptical of its merits if the issue, especially when subparts of the issue have not been fully briefed and an appeal is possible.

¶1 The petition in this case was filed by the Uninsured Employers' Fund (UEF) against the claimant, the claimant's employer, and the employer's sometime insurer, the Montana State Fund (State Fund). The State Fund now moves to dismiss certain claims and to stay discovery related to those claims. While the Court is skeptical that the claims at issue are viable, I have decided to allow the claims to proceed.

Factual Background

¶2 The motion to dismiss is based upon the pleadings. For purposes of the motion the facts pled in the petition are assumed to be true and are construed in a light most favorable to the UEF. *Missoula City-County Air Pollution Control Bd. v. Board of Environmental Review,* 282 Mont. 255, 259, 937 P.2d 463, 466 (1997).

¶3 According to the petition, the claimant suffered a work-related injury in September 1997. On September 26, 1997, claimant's employer, Big Sky Petroleum, Incorporated (Big Sky), reported the injury to the State Fund. It reported the injury as occurring on September 25, 1997, a date on which it was insured by the State Fund.

¶4 The State Fund accepted liability for the injury and thereafter paid benefits to the claimant. However, in July 1998, the claimant contacted the State Fund and reported that his injury occurred on September 23, 1997. On that date, Big Sky was not insured by the State Fund or any other insurer.

¶5 As a result of claimant's report, the State Fund initiated a fraud investigation of Big Sky. Thereafter, on November 2, 1998, it revoked its acceptance of the claim and terminated claimant's benefits, advising claimant to file a claim with the UEF. However, the State Fund never pursued a fraud case against Big Sky.

¶6 Claimant followed the State Fund's advice and filed a claim with the UEF, which ultimately accepted liability for the claim. UEF reserved the right to seek indemnification from the State Fund.

Discussion

¶7 The UEF asks the Court to determine whether the claimant's injury occurred on September 23 or September 25, 1997. If the injury occurred on September 25th, then the State Fund is liable for it and must indemnify the UEF since it admits it insured Big Sky on that date. (State Fund's Response to Petition for Hearing, ¶ 5.) If the injury occurred on September 23rd, the UEF alleges it is still entitled to indemnification since the State Fund

accepted liability for the claim in the first instance and did not properly terminate benefits. It is this latter claim that the State Fund alleges is deficient on its face.

¶8 The State Fund also asserts that the Court lacks jurisdiction to consider any claim that it covered Big Sky on September 23rd. The UEF, however, is not claiming that there was coverage on that date, thus coverage is not at issue.

¶9 The UEF argues that "[b]y unreservedly accepting this claim the State Fund effectivity made a determination that it had liability for the claim under the limitations set forth in § 39-71-407, MCA - i.e., that it insured Big Sky at the time of Mr. Strong's injury." (UEF's Opposition to Motion to Dismiss at 4.) It contends that "constitutional and procedural requirements . . . preclude its unilateral repudiation of liability." (*Id.*)

¶10 The constitutional basis for the UEF's argument is the due process clauses of the United States and Montana constitutions. It seems to the Court, however, that the right invoked belongs to the claimant. If claimant agrees that the claim was improperly accepted and the State Fund owes him no benefits, then what right does the UEF have to step in and assert he has been deprived of due process? Moreover, the UEF cites no case holding that an insurer must first seek Court approval to terminate benefits upon discovery of fraud or a mutual mistake of fact. A claimant whose benefits are terminated can resort to this Court for reinstatement; UEF does not address why that remedy is inadequate under the due process clauses, nor does it provide authority for the proposition that insurer's actions are even subject to the clauses.

¶11 UEF also argues that section 39-71-609, MCA, required the State Fund to give a 14- day notice of termination of benefits, therefore its immediate termination was invalid. As with the constitutional argument, it would seem that the protection afforded by the section is to claimant personally, in which case it could be waived. Moreover, even if the State Fund improperly terminated benefits because of a procedural defect, why would the State Fund be barred from recovering benefits paid to the claimant in error? The UEF does not address that issue at all. Moreover, if the UEF prevails, is the resulting benefit to it anything other than a windfall?

¶12 I am doubtful that the UEF has standing to avail itself of constitutional or statutory provisions protecting the claimant, or that its theories are viable. However, since the claims raised by the UEF are matters of first impression (neither party has cited any case directly addressing the theories and the Court is unaware of any Montana case doing so), I find that the UEF should be allowed to proceed to trial on its claims so that a full record is developed. Once that record is developed, it may well be that the claims need not be addressed. If they do need to be addressed, then the Court will invite further briefing on the concerns raised in this order. Then, if the claims are rejected and there is an appeal, there will be a full record available to the Supreme Court which, in the event of a reversal, will alleviate any need for remand for trial on the issues.

ORDER

¶13 The motion to dismiss is **denied without prejudice**. The merits of the motion will be reconsidered if necessary after trial.

¶14 The motion to stay discovery is **denied**. The State Fund shall answer written discovery not yet answered within 10 days of this Order.

DATED in Helena, Montana, this 21st day of October, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Daniel B. McGregor
Mr. Greg E. Overturf
Mr. R. Russell Plath
Mr. Jeffrey A. Simkovic
Submitted: October 11, 2002