IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 79

WCC No. 9906-8268

AMERICAN ALTERNATIVE INSURANCE GROUP,

Petitioner/Insurer,

and

FLATHEAD COUNTY SCHOOL DISTRICT 6,

Employer,

vs.

SUNG SORENSON,

Respondent.

ORDER GRANTING MOTION TO JOIN THIRD-PARTY DEFENDANT

Summary: Insurer for school district moved to join prior insurer in case where claimant sought occupational disease benefits. Prior insurer (MSGIA) was on risk when claimant had filed an earlier OD claim, which had been denied and not appealed. Arguing collateral estoppel, the prior insurer resisted joinder on the ground any issue of its liability had been resolved in the earlier case.

Held: Motion for joinder granted. While collateral estoppel may in fact bar any claim against MSGIA, that defense is better resolved after MSGIA becomes a party and the evidence is developed. On the face of the allegations made, MSGIA appears to be a necessary party in order to consider the issues raised in full and to grant full relief to the parties.

Topics:

Defenses: Collateral Estoppel. When insurer sought to join prior insurer into occupational disease proceeding in WCC, prior insurer argued claimant had previously filed a claim against it for the same condition and any present claim against it was barred by collateral estoppel. Court nonetheless granted motion for joinder, reasoning that while the collateral estoppel defense may ultimately prevail, that defense is better asserted based on the prior insurer's presence in the case and development of a record.

Procedure: Joining Third Parties. When insurer sought to join prior insurer into occupational disease proceeding in WCC, prior insurer argued claimant had previously filed a claim against it for the same condition and any present claim against it was barred by collateral estoppel. Court nonetheless granted motion for joinder, reasoning that while the collateral estoppel defense may ultimately prevail, that defense is better asserted based on the prior insurer's presence in the case and development of a record.

1 The claimant herein, who is named as the respondent, seeks occupational disease (OD) benefits. Following evaluation by a medical panel, the Department of Labor and Industry issued an initial determination finding in favor of claimant. The insurer, American Alternative Insurance Group (American), then requested a hearing before the Department. Meanwhile, the 1999 Legislature enacted HB 592, which became law on April 23, 1999. 1999 Mont. Laws, ch. 442. The bill amended the jurisdictional provisions of the Occupational Disease Act (ODA) to provide that all disputes over OD benefits shall be heard by the Workers= Compensation Court. *I*d., ' 31(2). American=s request for hearing was therefore transferred to the Court. Department ORDER REGARDING JURISDICTION (June 24, 1999). American subsequently filed a formal PETITION FOR HEARING (August 30, 1999), disputing the claim, hence claimant=s status as respondent.

2 The matter presently before the Court is American=s motion to join Montana Schools Group Insurance Authority (MSGIA) as a third-party defendant. MSGIA previously insured claimant=s employer and American alleges that it may be liable for any benefits which the Court might find payable to claimant. MSGIA disputes any liability and resists joinder.

Factual Background

3 The following facts are taken from the briefs with respect to American=s motion. They are unverified and adopted only for purposes of deciding the pending motion.

1. Claimant worked as a janitor for Flathead County School District 6 (School District) for some time.

2. On April 10, 1996, she filed a claim stating that she suffered back pain, shoulder pain, kidney infection, and blood infection as a result of her work for the School District. (MONTANA SCHOOLS GROUP INSURANCE AUTHORITY=S OBJECTION TO MOTION TO JOIN THIRd-PARTY DEFENDANT, Ex 1.)

3. At the time she filed her 1996 claim, the School District was insured by MSGIA. *(Id*.)

4. Pursuant to the ODA, the 1996 claim was referred to Dr. James Burton, a member of the Department=s occupational disease medical panel. Dr. Burton evaluated her back pain and concluded that it was not likely related to her employment with the School District. *(Id*., Ex. 2 at 4.)

5. Neither party requested further medical evaluation and on March 14, 1997, the Department entered an ORDER OF DETERMINATION finding that claimant was not entitled to occupational disease benefits. Its Order was as follows:

IT IS THEREFORE ORDERED the claimant's claim for benefits under the Occupational Disease Act is hereby denied, and the claimant is not entitled to any benefits under the Occupational Disease Act FOR SHOULDER & BACK PROBLEMS.

(MONTANA SCHOOLS GROUP INSURANCE AUTHORITY=S OBJECTION TO MOTION TO JOIN THIRD-PARTY DEFENDANT, Ex. 4, capitalization and bold in original.)

6. The Department=s ORDER OF DETERMINATION contained a notice of the right to request a hearing before the Department and stated that a hearing was necessary to preserve the right to challenge the Department=s Order. *(I*d.) Claimant did not request a hearing.

7. Claimant continued her employment with the School District.

8. On September 1, 1997, the insurer for the school district changed from MSGIA to American.

9. In October of 1997, claimant submitted a "second@ FIRST REPORT wherein she alleged that "over time my back has got worse, now I can=t work on Dr. advice.@ (MONTANA SCHOOLS GROUP INSURANCE AUTHORITY=S OBJECTION TO MOTION TO JOIN THIRD-PARTY DEFENDANT, Ex. 5.) The claim was received by American on October 15, 1997. (PETITION FOR HEARING, & 1.)

10. Based upon the second claim, the Department referred claimant to Dr. John Stephens, who examined claimant on March 2, 1999. Like Dr. Burton, Dr. Stephens found claimant to suffer from objectively verifiable back pain, diagnosing "L4-5 spinal stenosis with neuroforaminal encroachment and clear evidence of a right S1 radiculopathy.@ (MONTANA SCHOOLS GROUP INSURANCE AUTHORITY=S OBJECTION TO MOTION TO JOIN THIRD-PARTY DEFENDANT, Ex. 6, at 3). Unlike Dr. Burton, Dr. Stephens opined this condition "clearly appears to be an occupational disease." *(Id*.) He further stated: "This lady has been symptomatic for probably greater than 15, possibly 20 years. I doubt we will ever know exactly when the radicular pain started in her right leg.@ *(Id*.) Dr. Stephens also diagnosed a compression fracture, which he did not have information to trace to an occupational occurrence. He wrote: "while the compression fracture is obviously something that acutely happened, the majority of her pain appears to be due to Diagnosis No. 1. Without the exact time frame Diagnosis No. 2 can=t be determined anyway.@ *(I*d.)

11. Based upon Dr. Stephen=s report, on April 9, 1999, the Department issued an ORDER OF DETERMINATION finding that claimant suffers from an occupational disease.

12. On April 27, 1999, American wrote the Department stating that it disputed the determination. Under section 31(2) of Montana Laws 1999, chapter 442, the dispute was transferred to this Court on June 24, 1999. On August 30, 1999, American filed its PETITION FOR HEARING. The present motion for joinder was filed September 1, 1999.

Discussion

4 In both the motion and the underlying petition, American alleges that claimant=s back problems developed long before it began insuring the employer. Under section 39-72-303(2), MCA, American contends that MSGIA is the party responsible for claimant=s OD. Section 39-72-303(2), MCA, provides in relevant part:

(2) When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:

(a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or

(b) the time the employee knew or should have known that the condition was the result of an occupational disease.

5 MSGIA objects to joinder. It contends that claimant is collaterally estopped from recovering against it,[(1)] hence it has no liability with respect to claimant=s back condition.

6 In response, American makes two points: (1) whether the Department=s Order precludes recovery against MSGIA has not yet been resolved, and (2) if claimant is barred from recovering against MSGIA, she may also be barred from recovering against American. (PETITIONER=S RESPONSE TO BRIEF IN SUPPORT OF MOTION TO JOIN THIRD-PARTY DEFENDANT, MONTANA SCHOOL GROUP INSURANCE AUTHORITY at 2). The latter contention does not affect MSGIA since it would not affect its liability. The first, however, does involve MSGIA.

7 This Court=s rule on joinder, set forth at ARM 24.5.308, provides that joinder of parties shall be governed by the considerations set forth in rules 19, 20, and 21 of the Montana Rules of Civil Procedure. Rule 19, MONT. R.CIV.P., provides in relevant part:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person=s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person=s absence may (i) as a practical matter impair or impede the person=s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed

interest. If the person has not been so joined, the court shall order that the person be made a party.

8 Applying the rule, I find that MSGIA should be joined. While MSGIA may be correct in asserting that any claim against it is barred, its contention is more appropriately resolved, on the merits, **after** it is made a party. The merits of its defense cannot be considered when determining whether it should be joined. Moreover, MSGIA assumes that claimant=s 1997 OD claim is for the same condition at issue with respect to her 1996 claim. MSGIA may be correct, but the Court cannot make that determination without reaching the merits of the case.

ORDER

9 The motion for joinder is **granted** and MSGIA is ordered to file a response to the petition within 20 days of the date of this Order.

10 SO ORDERED.

DATED in Helena, Montana, this 8 th day of December, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Kelly M. Wills
Mr. Leo S. Ward
Mr. Kenneth S. Thomas
Submitted: October 27, 1999

1. The appropriate argument by MSGIA may involve *res judicata*, rather than *collateral estoppel*. *See Kelly v. State Compensation Ins. Fund,* 1999 MTWCC 60 5, explaining that the doctrines of *res judicata* and *collateral estoppel* are related, but "*res judicata* precludes relitigation of the same claim or cause of action; the doctrine of *collateral estoppel* bars relitigation of an issue or matter which was necessarily determined in a prior action." The doctrine of *res judicata* applies "when four criteria are met - the parties or their privies are the same; the subject matter of the claim is the same; the issues are the same and relate to the same subject matter; and the capacities of the persons are the same in reference to the subject matter and the issues." *Id*., quoting *Scott v. Henrich,* 283 Mont. 97, 101, 938 P.2d 1363, 1366 (1997).