IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 83

WCC No. 9906-8257

JOHN BALLARD

Petitioner

vs.

STILLWATER MINING COMPANY

Respondent/Insurer/Employer.

ORDER GRANTING MOTION TO JOIN THIRD PARTY

Summary: Claimant suffered a serious ankle injury working in Alaska during 1994. In 1997, he went to work as a miner in Montana. He alleges a reinjury to his ankle during January 1998. He had ankle surgery later that same month. Near the end of 1998, Alaska National, the workers' compensation carrier for the Alaska employer, terminated the TTD benefits it had been paying claimant on the ground that his January 1998 injury in Montana constituted a substantial aggravation of the preexisting injury. The Alaska insurer (Alaska National) demanded reimbursement from respondent Stillwater, which moved to join the Alaska National into this proceeding, which was filed by claimant, who asserts disability and a need for compensation and medical benefits from one of the two insurers. Alaska National argues the Montana WCC has no jurisdiction over it because it has only done minimal business in Montana.

Held: Where Alaska National has been authorized to sell insurance in Montana, and registered to do business in the state, since 1982, the WCC has personal jurisdiction over it under the doctrine of express consent through registration and/or appointment of an agent for service of process in the state. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95, 37 S.Ct. 344, 344, 61 L.Ed. 610 (1917); Sternberg v. O'Neil, 550 A.2s 1105 (Del. 1988). Joinder is appropriate because of common issues of law and fact in the various parties' claims against each other.

Topics:

Jurisdiction: Personal Jurisdiction. After suffering ankle injury working in Alaska, claimant worked as a miner in Montana and reinjured his ankle. The Alaska WC carrier paid benefits for ankle surgery following the reinjury, then demanded reimbursement from the Montana WC carrier upon realizing the surgery followed a Montana reinjury. When claimant filed a

petition against the Montana carrier, it moved to join the Alaska carrier, which argued the Montana WCC had no personal jurisdiction over it because it did minimal business in Montana. WCC held that where the Alaska carrier has been authorized to sell insurance in Montana, and registered to do business in the state, since 1982, the WCC has personal jurisdiction over it under the doctrine of express consent through registration and/or appointment of an agent for service of process in the state. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95, 37 S.Ct. 344, 344, 61 L.Ed. 610 (1917); Sternberg v. O'Neil, 550 A.2s 1105 (Del. 1988).

Procedure: Joining Third Parties. After suffering ankle injury working in Alaska, claimant worked as a miner in Montana and reinjured his ankle. The Alaska WC carrier paid benefits for ankle surgery following the reinjury, then demanded reimbursement from the Montana WC carrier upon realizing the surgery followed a Montana reinjury. When claimant filed a petition against the Montana carrier, it moved to join the Alaska carrier. After finding that it had personal jurisdiction over the Alaska carrier, the WCC found joinder appropriate because of common issues of law and fact in the various parties' claims against each other.

¶1 The matter before the Court is respondent's (Stillwater's) motion to join Alaska National Insurance Company (Alaska National) as a party. Claimant (Ballard) joins in the motion.

¶2 Alaska National opposes the motion on the ground that Montana courts lack personal jurisdiction over it. For the reasons that follow, I find this Court does have personal jurisdiction over Alaska National and that it should be, and is, joined as a party-respondent.

Factual Background

¶3 For purposes of the motion for joinder, it appears that the parties and Alaska National do not dispute the following basic facts.

a. Claimant sustained a serious ankle injury during November of 1994 while working for Echo Bay Exploration, Incorporated, in Alaska. As insurer for Echo Bay, Alaska National accepted liability and paid workers' compensation benefits, including medical benefits for various surgical procedures.

b. Stillwater alleges claimant was restricted to light-duty work following his Alaska injury and that he knew he needed additional surgery on his ankle.

c. Despite his ankle condition, in 1997 claimant went to work as a miner for Stillwater in Montana.

d. The petition filed herein by claimant alleges that on January 20, 1998, he reinjured his ankle while working for Stillwater. Claimant contends that he "stepped on a rock and badly sprained his right ankle, aggravating a pre-existing condition." (Petition for Emergency Hearing, ¶ 1.)

e. In January 1998, claimant underwent ankle surgery. On account of the surgery, Alaska National paid temporary total disability benefits and medical benefits.

f. Near the end of 1998, Alaska National learned of claimant's alleged Montana injury and terminated his temporary total disability benefits "on the grounds that his injury of 1/20/98 with the Stillwater Mine constituted a substantial aggravation of his preexisting injury." (Petition for Emergency Hearing ¶ 6(a)).

g. Alaska National has made demand upon Stillwater for reimbursement of $41,000 in temporary total and medical benefits it paid on account of the 1998 surgery, alleging that Stillwater is liable for those benefits.

¶4 Claimant alleges that at present he remains unable to work, suffers substantial economic hardship, and is caught between the two insurers which both deny liability for his disability and further medical expenses.

DISCUSSION

¶5 The Court is faced with several issues. Initially, Stillwater argues that Alaska National has waived any right to object to jurisdiction by failing to file a special appearance. Second, it argues that its brief regarding jurisdiction is untimely, therefore it should not be considered. Third, in the event I overrule these objections, I must then consider the merits of Alaska National's jurisdictional arguments. Finally, assuming I find jurisdiction, I must determine whether Alaska National should be joined as a party.

I. Waiver of Objection to Jurisdiction

¶6 Alaska National is represented by Robert J. McLaughlin, who is admitted to practice in the State of Washington but not in Montana. Mr. McLaughlin therefore petitioned the Court to appear in this matter *pro hac vice*. Stillwater contends that Mr. McLaughlin's application did not mention or reserve the personal jurisdiction defense, therefore the issue was waived. Alaska National replies that Mr. McLaughlin's application for admission was a prerequisite to his appearance and that its initial appearance came through a Special Appearance to Provide Notice of Representation Filed by Mr. Michael P. Heringer, a Montana attorney associated with Mr. McLaughlin in this case. *See*, rules for Admission to the Bar of the State of Montana, Section IV, *Pro Hac Vice*, (A) and (D). Mr. Heringer's initial appearance, like the Special Appearance to Provide Notice of Representation later filed by Mr. McLaughlin, indicates his appearance was made "without waiving and expressly reserving any and all rights to assert that this Court lacks personal jurisdiction over the Employer and/or Insurer."

¶7 Stillwater's argument is without merit. The initial appearance was filed by Mr. Heringer and constituted a special appearance contesting personal jurisdiction of the Court.

II. Timeliness

¶8 Stillwater contends that Alaska National's objection to joinder is untimely since it was filed 48 days after the Commissioner of Insurance mailed notice of service to it. § 31-1-603, MCA (requiring a response to be filed within 30 days of mailing). It further argues that the response was not timely under this Court's rule for responding to motions, ARM 24.5.308, which allows for only 10 days.

¶9 The time for Alaska National's response was 30 days, not 10. The statute for service on Alaska National supercedes the Court's shorter time frame.

¶10 The pleadings and motion were mailed to Alaska National's Senior Vice President on September 8, 1999. On September 30, 1999, this Court received and filed Mr. McLaughlin's Application for Admission Pro Hac Vice and Motion for Order Admitting Robert J. Mclaughlin Pro Hac Vice. Prior to granting the motion, the Court required additional information to ensure compliance with Montana rules governing *pro hac vice* practice. Mr. McLaughlin satisfied the Court's concerns and the Court's order granting admittance *pro hac vice* issued October 6, 1999. Meanwhile, on October 3, 1999, Mr. Heringer filed his appearance on behalf of Alaska National "without waiving and expressly reserving any and all rights to assert that this Court lacks personal jurisdiction over the Employer and/or Insurer." (Special Appearance to Provide Notice of Representation (received October 6, 1999 and deemed filed October 3, 1999). The notice was filed within 30 days of service and provided fair notice of Alaska National's objection to being joined as a party.

III. In Personam Jurisdiction

¶11 Alaska National contends it has insufficient contacts with Montana to authorize Montana's exercise of personal jurisdiction over it. In support of its position, it has filed an Affidavit of Richard Suddock, a Senior Vice President for the company. The affidavit states in relevant part:

3. Alaska National Insurance Company is a domestic insurance carrier principally operating within the State of Alaska.

4. For the years 1997 and prior, Alaska National Insurance Company did not underwrite any insurance or policies within the State of Montana.

5. For the year 1998, Alaska National Insurance Company wrote one insurance contract within the State of Montana. The insured was 3-D Geophysical, Inc., and the premium totaled $3,896.00. This premium constituted .00675 percent of Alaska National Insurance Company's business in the year 1998.

6 In 1999, Alaska National Insurance Company wrote one insurance contract within the State of Montana. The insured was Northern Construction, Inc., and the premium totaled $3,005.00. This premium represented .007748 percent of Alaska National Insurance Company's year-to-date business through September 30, 1999.

7. Alaska National Insurance Company does not currently nor has it in the past advertised or otherwise solicited insurance business within the State of Montana.

(Affidavit of Richard Suddock at 1-2.)

¶12 Stillwater provides additional information which it obtained from the office of the Montana Commissioner of Insurance. Those additional facts, which are not contested by Alaska National, are:

Alaska National has been authorized to sell insurance in Montana, and registered to do business in the state, since 1982. (Affidavit of Mark M. Kovacich, ¶ 2.)

¶13 Alaska National admits it is licensed to sell insurance within Montana, but insists it has not solicited insurance business within the state and therefore is not subject to Montana jurisdiction except as to the two insurance policies it sold. Counsel for Alaska National represents as follows:

The insurance contracts for the years 1998 and 1999 resulted from Alaska National's existing clients in Alaska who also conduct business in Montana. These insurance contracts were in no way related to any solicitation or other activity by Alaska National seeking to provide insurance services in the State of Montana. This was purely collateral business stemming from an existing relationship in the State of Alaska.

(Memorandum in Support of Request for Oral Argument on Motion to Join Indispensable Party at 2.)

¶14 Rule 4(B)(1) of the Montana Rules of Civil Procedure provides, "**All persons found within the state of Montana are subject to the jurisdiction of the courts of this state**." [Emphasis added.] The rule goes on to provide:

In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state.

¶15 Personal jurisdiction may be acquired under Rule 4(B) in two ways: by general jurisdiction ("all persons found within the state of Montana") or by long arm jurisdiction (subsections (a) through (f) of Rule 4(b)(a)). As explained in *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83, 796 P.2d 189, 194 (1990):

Rule 4B(1), M.R.Civ.P., incorporates the principles of both general and specific jurisdiction. **The first sentence deals with the question of general jurisdiction, that is, whether the party can be "found within" the state.** A party is "found within" the state if he or she is physically present in the state **or if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there**. A nonresident defendant that maintains "substantial" or "continuous and systematic" contacts with the forum state is found within the state and may be subject to that state's jurisdiction even if the cause of action is unrelated to the defendant's activities within the forum. *Simmons* [*v. State],* 206 Mont. [264] at 276, 670 P.2d [1372] at 1378 [(1983)](quoting *Data Disc Inc. v. Systems Tech. Assoc., Inc.,* 557 F.2d 1280, 1287 (9th Cir. 1977)).

The remainder of Rule 4B(1), M.R.Civ.P. addresses the concept of **specific jurisdiction**. Under this theory, jurisdiction may be established even though a defendant maintains minimum contacts with the forum as long as the plaintiff's cause of action arises from any of the activities enumerated in Rule 4B(1), M.R.Civ.P. and the exercise of jurisdiction does not offend due process. *Simmons,* 206 Mont. at 276, 670 P.2d at 1378 (1983). [Emphasis added.]

¶16 Under Rule 4B, general jurisdiction exists over persons "found within the state of Montana." Corporations are "persons" for purposes of the rules of civil procedure. Rule 4A, M.R.Civ.P. In determining whether a person is "found within the state of Montana," Montana cases have focused upon whether the party "is physically present in the state or [whether] his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there." *Simmons Oil Corp. Holly Corp., supra,* 244 Mont. 75, 83, 796 P.2d 189, 194; *Simmons v. State*, 206 Mont. 264, 276-77, 670 P.2d 1372, 1379 (1983). In the case of a foreign corporation, one decision has said:

Before the activities of a foreign corporation can create a physical presence within Montana, those activities must be substantial, continuous and systematic as opposed to isolated, casual, or incidental. The activities must comprise a significant component of the company's business, although the percentage as related to total business may be small. [Cites omitted.]

Reed v. American Airlines, 197 Mont. 34, 36, 640 P.2d 912, 914 (1982).

¶17 The focus on "substantial, continuous and systematic" activities, as set forth in *Simmons* and the laundry list found in Rule 4B(1) is derived from due process considerations outlined by the Supreme Court of the United States in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and subsequent cases. *See, Edsall Const. Co., Inc. v.* Robinson, 246 Mont. 378, 382, 804 P.2d 1039, 1042 (1992); *Matter of the Estate of Ducey,* 241 Mont. 419, 423, 787 P.2d 749, 751 (1990); *Simmons v. State, supra*, 206 Mont. at 272-73, 670 P.2d at 1377. Those considerations do not apply to persons' served with process while physically within a State, *Burhnam v. Superior Court,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) or to corporations registered to do business in the state, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95, 37 S.Ct. 344, 344, 61 L.Ed. 610 (1917).

¶18 In a long line of federal and state cases, foreign corporations have been "found within" a state for purposes of general jurisdiction based solely upon registration to do business and/or appointment of an agent for service of process in the state. The most significant of those cases is *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95, 37 S.Ct. 344, 344, 61 L.Ed. 610 (1917), in which the United States Supreme Court held that an out-of-state insurance company, which authorized an agent to receive service of process in compliance with a state registration statute, consented to the exercise of general personal jurisdiction in that state. The unanimous opinion, written by Justice Holmes, held that Missouri could constitutionally exercise general jurisdiction over the insurer even though the insurance company's only apparent contact with Missouri was its designation of the Missouri Superintendent of Insurance as its registered agent. The Court found jurisdiction even though the action involved a Colorado policy insuring an Arizona corporation with respect to buildings located in Colorado. *Id.* 243 U.S. at 95, 61 L.Ed. at 616. Similarly, in *Neirbo Company v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175, 60 S.Ct. 153, 84 L.Ed. 167, 174 (1939), the Supreme Court held that New York had personal jurisdiction over a foreign corporation which had registered to do business and appointed an agent for service of process. It noted that New York jurisdiction was "part of the bargain by which Bethlehem enjoys the business freedom of the State of New York."

¶19 If *Pennsylvania Fire* and *Neirbo* are good law, then Alaska National's registration to sell insurance in Montana, and its concomitant appointment of the Montana Secretary of State as its agent for service of Montana process, give Montana and this Court general jurisdiction over it. However, both cases preceded *International Shoe.*

¶20 Numerous courts have considered the effect of *International Shoe* and its progeny upon the holding in *Pennsylvania Fire.* While some of the cases have found that *International Shoe* modified or impliedly overruled *Pennsylvania Fire, e.g., Conner v. Conticarriers and Terminals, Inc.,* 944 S.W.2d 405, 417 (Tex.App. 1997); *Armstrong v. Aramco Services Co.,* 155 Ariz. 345, 746 P.2d 917, 924 (Ariz. App. 1987); *Washington Equipment Mfg. v. Concrete Placing,* 85 Wash.App. 240, 245, 931 P.2d 170, 172

(1997); *Bellepointe, Inc. v. Kohl's Department Stores, Inc.,* 975 F.Supp. 562, 564 (S.D.N.Y. 1997); there is substantial, better reasoned authority holding otherwise, *e.g.*,*Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988); *Knowlton v. Allied Van Lines,* 900 F.2d 1196 (8th Cir. 1990); *Sondergard v. Miles, Inc.,* 985 F.2d 1389 (8th Cir. 1993)*; Sharkey v. Washington National Ins. Co.,* 373 N.W. 421 (S.D. 1985); *Dombroff v. Eagle-Picher Industries, Inc.*, 450 So.2d 923, *rev. den.* 458 So.2d 272 (1984); *Continental Casualty Co. v. American Home Assurance Co.*, 61 F.Supp.2d 128 (D.Del. 1999); *Augsbury Corp. v. Petrokey Corp.,* 97 A.D.2d 173, 175, 470 N.Y.S.2d 787, 789 (1983); *In re DES Cases,* 789 F.Supp. 552, 569 (E.D.N.Y. 1992).

¶21 As an initial matter, *Pennsylvania Fire* has never been expressly overruled or even questioned by the United States Supreme Court. A good discussion of its continued viability is set out in *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), wherein the Delaware Supreme Court considered "whether Delaware courts may assert general personal jurisdiction over a foreign corporation upon the basis of that corporation's qualification to do business in Delaware and its appointment of an agent to receive service of process in Delaware pursuant to a registration statute." *Id.* at 1109. The Court found that Delaware indeed had jurisdiction based upon the concept of the "express consent" of the corporation, as shown by its registration to do business in Delaware. The Court distinguished *International Shoe*, which it characterized as predicated on *implied consent* to personal jurisdiction arising from contacts with the forum state, *Sternberg, supra*, 550 A.2d at 1110, and followed *Pensylvania Fire*.

¶22 The *Sternberg* court found no contradiction between the express consent doctrine in *Pennsylvania Fire* and the implied consent analysis of *International Shoe.* In the words of the Court, "It would appear that the due process holdings of *Pennsylvania Fire Ins. Co.* (express consent by registration) and *International Shoe* (implied consent by minimum contact) complement one another and are neither inconsistent nor mutually exclusive." *Sternberg, supra,* 550 A.2d at 1110. The court recognized that some legal scholars, and some state and lower federal courts, have questioned whether express consent through registration may form the basis for personal jurisdiction without satisfying the minimum contacts analysis of *International Shoe* and later cases. *Sternberg, supra,* 550 A.2d at 1110 n.8. After reviewing United States Supreme Court cases decided after *International Shoe*, it concluded *Pensylvania Fire* is still good law.

¶23 As noted by *Sternberg*, even though most contemporary cases have involved a "minimum contacts" analysis, the United States Supreme Court has continued to indicate that registration to do business in a state is a sufficient bases to confer jurisdiction upon the state under the Due Process Clause: The *Sternberg* Court explained:

Not long after its decision in *International Shoe*, the United States Supreme Court upheld the constitutional validity of an exercise of *in personam* general jurisdiction with respect to

a claim unrelated to the foreign corporation defendant's forum activity. *Perkins v. Benguit Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed.485, *reh'g denied,* 343 U.S. 917, 72 S.CT. 645, 96 L.Ed. 1332 (1952). . . . It was necessary for the *Perkins* Court to conduct a minimum contact analysis before it could find an *implied consent* to the general jurisdiction of Ohio because *the foreign corporation was not qualified* in Ohio and *had not appointed an agent* for service of process. Nevertheless, *Perkins* reaffirmed the principle that there would have been no need to search for minimum contacts to support an implied consent to jurisdiction, if express consent had been given:

Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service and receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through service of process upon that representative.

Perkins v. Benguet Consol. Mining Co., 342 U.S. at 444, 72 S.Ct. at 417. [Ft. omitted.]

The United States Supreme Court continued to acknowledge that the due process considerations are different when state court jurisdiction is based on implied consent and when such jurisdiction is based on express consent in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). . . . [In that case], the Court reiterated its long-standing position that the personal jurisdiction requirement is a waivable right. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472, n. 14, 105 S.Ct. at 2182 n. 14. [Ft. omitted]. Therefore, the Court held that "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented* to suit there," due process is satisfied if the defendant has minimum contacts with the forum. *Id*. at 472, 105 S.CT. at 2182 (emphasis added [by *Sternberg*]). Thus, in *Burger King Corp.,* as in *Perkins*, the Supreme Court found that in the absence of express consent, due process requires minimum contacts for a finding of implied consent to a forum's jurisdiction. *Id.* Conversely, due process is satisfied by express consent, since express consent constitutes a waiver of all other personal jurisdiction requirements. *See id*.

Sternberg, supra, 550 A.2d at 1111-1112.

¶24 The *Sternberg* Court also considered *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988):

The issue in *Bendix Autolite Corp.*, as in *Perkins*, involved an unregistered foreign corporation and an attempted assertion of jurisdiction over the foreign corporation by the state of Ohio. In *Bendix Autolite Corp.,* the Court appeared to accept the rationale, explicitly stated in the Ohio statute, that the appointment of an agent for service of process would operate as a consent to general jurisdiction in any cause of action, "including those in which it did not have minimum contacts necessary for supporting personal jurisdiction,"

without offending the requirements of due process. *Id*. 108 S.CT. at 2221. In a preamble to its ultimate holding, the Court stated:

[D]esignation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend. *Cf. World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 [100 S.CT. 559, 62 L.Ed.2d 490] (1980). The Ohio statutory scheme thus forces a corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense [not available without registration], remaining subject to suit in Ohio and perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

Id.

Sternberg v O'Neil, *supra*, 550 A.2d at 1112-1113.

¶25 Based upon its analysis of the Supreme Court cases, the *Sternberg* Court found "the holdings of the United States Supreme Court which involved foreign corporations, following *International Shoe*, are entirely consistent with the continued viability of its earlier holding in *Pennsylvania Fire Ins. Co.*" *Sternberg*, *supra*, 550 A.2d at 1113. Thus, according to *Sternberg*, the modern rule may be summarized as follows:

If a foreign corporation has not expressly consented to a state's jurisdiction by registration, "minimum contacts" with that state can provide a due process basis for finding an implied consent to the state's jurisdiction. *International Shoe Co. v. Washington,* 326 U.S. at 316-18, 66 S.Ct. at 158-59; *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474-76, 105 S.Ct. at 2183-84; *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. at 446, 72 S.Ct. at 418. If a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of "minimum contacts" to find implied consent is unnecessary. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. at 95, 37 S.Ct. at 344; *See Bendix Autolite Corp. v. Midwesco Enterprises,* 108 S.Ct. at 2221; *Burger King Corp. v. Rudzewicz,* 471 U.S. at 472, 105 S.Ct. at 2182. *Cf. Perkins v. Benguet Consol. Mining Co.,* 342 U.S. at 445-46, 72 S.Ct. at 418.

Sternberg, supra, 550 A.2d at 1113,

¶26 *Sternberg* was decided in 1988. Two years later, the United States Supreme Court decided a case which supports the conclusion that it still adheres to the express consent doctrine of *Pennsylvania Fire*. The case was *Burhnam v. Superior Court,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), which involved an action for dissolution of marriage filed in California by a woman whose husband continued to reside in New Jersey, where the couple had lived. The husband was served personally while on a business trip and visiting his children in California. Relying upon *International Shoe* and its progeny, he argued he

had insufficient contacts with California to satisfy the due process. The Supreme Court unanimously rejected his argument. All of the Justices found that personal service upon the husband while physically present in California was by itself sufficient for California to exercise general jurisdiction over him. Writing for a plurality, Justice Scalia cited precedents holding that, without any showing of minimum contacts, a state has personal jurisdiction over a person physically found and served within its borders. He rejected the notion that *International Shoe* annuls its prior decisions concerning jurisdiction conferred by personal service in a state:

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by analogy to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

Id. at 619. The concurring opinions, while diverging from some statements made by Justice Scalia, agreed that voluntary physical presence in a state is a sufficient basis for the state to exercise general jurisdiction.

¶27 A corporation has no physical presence other than through its employees and agents. It is a creature of law, and its rights are determined by state law. In Montana, a foreign insurance company may do business in the state only if it is registered to do business within the state and appoints the Montana Secretary of State its agent to accept service of process. Section 33-2-101, MCA, requires a certificate of authority to act as an insurer within the state, except in specified circumstances not relevant here. Section 33-1-601, MCA, requires insurers applying for such authority to designate the Montana Commissioner of Insurance as their agent for receipt of service of process, providing:

33-1-601. Commissioner - attorney for service of process. (1) **Each insurer applying for authority to transact insurance in this state shall appoint the commissioner and his successors in office as its attorney to receive service of legal process issued against it in Montana.** The appointment shall be made on a form as designated and furnished by the commissioner. The appointment shall be irrevocable, shall bind the insurer and any successor in interest or to the assets or liabilities of the insurer, and **shall remain in effect as long as there is in force in Montana any contract made by the insurer or obligations arising therefrom.**

(2) Each insurer at the time of application for a certificate of authority shall file with the commissioner designation of the name and address of the person to whom process against it served upon the commissioner is to be forwarded. The insurer may change such designation by a new filing. [Emphasis added.]

Alaska National requested and obtained authority to sell insurance in Montana and thereby designated the Montana Secretary of State as its agent for service of process. In fact, in each of 1998 and 1999 it sold a Montana policy, thus availing itself of its privilege to do business in the State.

¶28 Under Montana insurance law, there is no provision limiting claims to those arising within Montana. The statute provides that insurers "applying for authority to transact insurance in this state shall appoint the commissioner and his successors in office as its attorney to receive service of legal process issued against it in Montana." § 33-1-601, MCA. Stillwater asks the Court to compare this wording with section 33-1-612, MCA, which concerns service of process upon unauthorized insurers doing business in the state. In pertinent part, that statute provides that unauthorized insurance activity in Montana "shall be deemed to constitute an appointment by such insurer of the commissioner . . . in any action or proceeding against such insurer **arising out of any such contract or transaction** . . . ." The comparison is persuasive. Had the legislature intended to limit jurisdiction of Montana Court's to claims arising out of a Montana insurance contract, it plainly knew how to do so, and in fact did so with respect to unregistered companies.

¶29 Applying *Pennsylvania Fire*, I find that this Court may exercise personal jurisdiction over the Company.

IV. Appropriateness of Joinder

¶30 Rule 24.5.308(1) provides that "joinder of parties shall be governed by the considerations set forth in Rules 19, 20 and 21 of the Mont.R.Civ.P." Rule 19 governs necessary parties, providing in relevant part:

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(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. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 20 provides for permissive joinder, providing in relevant part:

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

¶31 In the present case there is a common issue of fact, specifically whether claimant suffered a subsequent injury which materially and permanently aggravated his preexisting ankle condition. Establishment of that fact would entitle claimant to both compensation and medical benefits from Stillwater Mining commencing the date of his alleged injury at Stillwater Mining. Conversely, the parties agree that such fact would relieve Alaska National of its liability under Alaska law for benefits following the alleged accident. The finding of a subsequent injury may also entitle Alaska National to indemnity from Stillwater for benefits it has paid subsequent to the alleged injury, and indeed Alaska National has served Stillwater Mining with a letter demand for indemnification. Since there is a common issue of fact affecting the liability among the parties, joinder is appropriate under Rule 20.

¶32 Joinder is also appropriate under the more stringent requirements of Rule 19. If Alaska National is not made a party, then any judgment of the Court will extend only to Stillwater Mining and the claimant. If the judgment favors claimant against Stillwater Mining, that company might seek to relitigate the subsequent injury question in any subsequent action brought by Alaska National for indemnification. If Stillwater Mining prevails, Alaska National might nevertheless attempt to interpose a subsequent injury defense in any action by claimant for further benefits from it. The potential for relitigation of the common fact gives rise to a risk of inconsistent obligations, therefore satisfying Rule 19(a)(2)(ii).

¶33 In joining Alaska National, the Court acknowledges it lacks jurisdiction to determine Alaska National's obligations, if any, to claimant. Subject matter jurisdiction over the Alaska claim rests in Alaska. But it does have subject jurisdiction over whether claimant suffered a subsequent injury, and thus whether Alaska National may be entitled to indemnification. Counsel for Alaska National has informed the Court that defenses other than the alleged subsequent injury may be available to it. Those are matters which the Court cannot and will not entertain. Alaska National is joined solely with respect to the

question of whether claimant suffered a subsequent, material, and permanent injury while working for Stillwater Mining.

ORDER

¶34 The motion for joinder is **granted.** Alaska National shall file its written response in this action within 20 days of the date of this Order. Alaska National, as well as the other parties herein, shall adhere to the Court's scheduling order to be issued at a later date.

DATED in Helena, Montana, this 23rd day of December, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston Mr. Joe C. Maynard
Mr. Robert J. McLaughlin
Mr. Michael P. Heringer
Date Submitted: December 8, 1999