IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 28

WCC No. 9601-7477

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner/Insurer for

STIMSON LUMBER COMPANY

Employer

vs.

CHAMPION INTERNATIONAL CORPORATION

Respondent.

ORDER DENYING SUMMARY JUDGMENT

This is an action between two insurers over liability for Ronald Deschamps' bad back. In 1992 Deschamps injured his back while working at Champion International Corporation's lumber mill in Bonner, Montana. He returned to work. The Bonner mill was then purchased by Stimson Lumber Company. Deschamps went to work for Stimson but his back continued to hurt and he complained to his new employer. Stimson turned the matter over to its insurer, Liberty Northwest Insurance Corporation. Liberty investigated the matter and ultimately accepted Deschamps' condition as compensable under the Montana Occupational Disease Act (MODA). But after paying benefits under MODA, Liberty decided that Deschamps' condition is the result of his 1992 injury and petitioned this Court for indemnification from Champion.

The matter presently before the Court is Champion's Motion for Summary Judgment. Affidavits supporting and opposing the motion have been submitted and the motion briefed.

Facts

The facts are set forth in the admitted allegations of the petition, two affidavits of Bradley J. Luck, an affidavit of Cynthia Bean, and the exhibits attached to the affidavits. Each of the Luck affidavits is Entitled Affidavit of Bradley J. Luck, so the affidavit filed February 1, 1996, will be cited as "Luck Affidavit I" while the affidavit filed February 28, 1996, will be cited as "Luck Affidavit II." The Affidavit of Cynthia Bean will be cited as "Bean Affidavit." The Luck

exhibits are numerical, with 1 through 5 attached to Luck Affidavit I. Exhibits 6 through 16 are attached to Luck Affidavit II. The Bean exhibits are A through C. The essential facts are not in controversy and for the most part are documentary.

Ronald Deschamps injured his back on March 30, 1992, while working a as millwright at a wood products mill in Bonner, Montana. (Ex. A; Petition ¶1; Response ¶1.[1]) At the time of the injury, the Bonner mill was owned by respondent, Champion International Corporation. (Luck Affidavit I.)

Claimant filed a Claim for Compensation. (Ex. A.) Champion, which was self-insured, accepted the claim and paid benefits. (Petition ¶2; Response ¶1.) The nature and amount of benefits paid are not specified, however, they are not material to the present motion.

Subsequent to Deschamps' injury, Champion sold the Bonner mill to Stimson Lumber Company. Stimson took over the Bonner mill operations in November of 1993. (Luck Affidavit I.) Deschamps applied for a position with the new owner of the mill and underwent a physical examination; he was found fit for employment. (Ex. 2.) He was hired and went to work.

While working for Stimson, Deschamps experienced renewed or continuing back pain. He submitted a claim to Liberty on October 12, 1994. (Bean Affidavit ¶ 2.) In that claim he described an injury as follows:

> I went to pick up a box off some sawhorses to put it on a bench and felt like a shock in the lower part of my back . . . it when [sic] down my right leg.

(Ex. A.) However, he fixed the date of the described injury as March 30, 1992 (*id*.), which is the date of his injury at Champion. The Court has not been provided with a copy of the 1992 claim or with other information regarding the 1992 accident. Thus, based on the sparse information provided, it can only assume that the accident described in the 1994 claim was the 1992 accident and that the claimant was attributing his back symptoms to the 1992 accident.

> Stimson nonetheless filed an employer's first report in which it similarly described claimant as picking up a box off some sawhorses and listing the date of injury as March 30, 1992. (Ex. B.) The report provided some additional information. Specifically, it noted that claimant had not sustained any new injury while working for Stimson and that he had had ongoing back problems since his 1992 injury. (*Id*.)
>
> Cynthia Bean, an adjuster for Liberty, was assigned the 1994 claim. On November 8, 1994, she wrote separate letters to Deschamps and Compensation Adjusters, which apparently adjusts claims for Champion. Mr. Bradley J. Luck, the attorney for Champion, was copied with the letter to Compensation Adjusters.

> In her letter to Deschamps, Bean indicated that Liberty was accepting the claim under the Occupational Disease Act but with a reservation of rights. She wrote:

In follow-up to our recent telephone conversation, please be advised we will be accepting your claim under the Occupational Disease Statutes of Montana with regard to your back problems which you relate as being ongoing since your injury with Champion International on March 30, 1994 [1992]. Acceptance of this claim is done so without making any admission of liability on Stimson Lumber Company. Investigation on the part of Liberty Northwest Insurance Company is not to be construed as admission of liability by this company or Stimson Lumber Company.

(Ex. 3.)

In her letter to Compensation Adjusters, Bean advised that Liberty had "recently assumed obligation for ongoing medical billings accumulating as a result of the above-referenced claim presented by Ronald Deschamps." (Ex. 4.) She went on to state that Liberty's acceptance was "being made without making any admission of liability." (*Id*.) Finally, she notified Compensation Adjusters that Liberty might seek indemnification from Champion:

> Once we have completed our investigation we will be in a position to make a determination as to whether we will be looking to you for indemnity for monies expended on this claim, if deemed appropriate.

(*Id*.)

Thereafter, on January 23, 1995, Bean again wrote to Compensation Adjusters, copying Mr. Luck. Her letter indicated that Liberty had completed its investigation and was accepting the Deschamps claim. In full, she said:

> Please be advised we have completed our investigation of the above-referenced claim.
>
> The decision was made by in-house counsel, Larry Jones, we will be accepting the above-referenced claim on behalf of Stimson Lumber Company under the classification of an occupational disease claim since it appears Mr. Deschamps is experiencing flare-ups with his back due to his employment with Stimson Lumber Company.

(Ex. 5.) The Court takes specific note that in the *regarding* portion of the letter, Bean refers to "Our Claim #WC687-014224 (**back - occupational disease**)." (*Id.*; emphasis added.) There is no indication whether Deschamps was provided a similar notice.

But, in a patent contradiction of the January 23, 1995 letter, Bean thereafter wrote to Deschamps on June 22, 1995. The letter referred to the same claim number, again noting that it involved the back. In the letter she notified Deschamps that Liberty's investigation into the claim was ongoing and that it would be paying wage loss benefits pursuant to section 39-71-608, MCA. The letter read in relevant part:

> Your above-referenced claim for workers' compensation benefits is **still being investigated** under the Occupational Disease Statutes of Montana.
>
> Please be advised, your claim is being placed under **Section 608** of the Montana Workers' Compensation Act. As such, we are paying wage benefits to you without accepting liability for your claim. As information is received, your claim will be reviewed to determine acceptance or denial.

(Ex. C; underlining in original, emphasis added.) In her affidavit, Bean states that at the time the letter was written, Liberty initiated wage loss benefits for the first time. (Bean Affidavit at 3.)

In this action, Liberty now asserts that Deschamps' back condition "is the direct result and/or natural progression of the claimant's March 30, 1992, injury for which Champion is liable." (Petition for Hearing, prayer 1.) It asks the Court to order Champion to "reimburse Liberty Northwest for all medical and wage loss benefits it has paid the claimant." (*Id.* at prayer 2.) The question presented by Champion's Motion for Summary Judgment is whether Liberty's unconditional acceptance on January 23, 1995, of Deschamps' claim against Stimson bars it from seeking indemnification from Champion.

Summary Judgment Standard

In prior decisions this Court has borrowed from the Montana Rules of Civil Procedure, specifically Rule 56, when considering motions for summary judgment. Reference to Rule 56 was necessary because the Workers' Compensation Court had not adopted rules governing such motions. That void was recently filled with the Court's adoption of ARM 24.5.329, effective February 23, 1996. The new rule, with modifications inapplicable for present purposes, tracks Rule 56. Thus, even though it became effective midway through the briefing in this case, it establishes the basic standards applicable to the present motion.

As does Rule 56(c), Mont.R.Civ.P., ARM 24.5.329(2) provides in relevant part:

> [S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Discussion

Champion argues that Liberty accepted liability for Deschamps' subsequent claim and that its acceptance ends the inquiry. Liberty argues that it can "deny liability after liability has been unconditionally accepted if facts after the acceptance of liability indicate liability no longer exists." (Liberty Northwest's Brief in Opposition [To Motion] for Summary Judgment at 7.) The Court declines to adopt either party's analysis.

The January 23rd letter is plain on its face. Liberty, through its adjuster, expressly and unequivocally accepted liability for Deschamps' back condition as an occupational disease. It did so with full knowledge of Deschamps' prior back injury while working for Champion. It did so unequivocally, without reservation of any rights as to either Deschamps or Champion. Its later June 22nd letter, which attempts to condition its liability by invoking section 39-71-608, MCA, is a nullity. *Cf. Haag v. Montana Schools Ins. Authority*, 906 P.2d 693 (Mont. 1995).

The issue is not whether Liberty can repudiate its acceptance of Deschamps' occupational disease claim, for plainly it cannot, or whether such acceptance is binding, for plainly it is, but whether its acceptance of liability bars Liberty from seeking indemnification from Champion for the benefits it has paid to Deschamps.

In the context of workers' compensation, indemnification may arise in subsequent injury cases. Where a worker suffers an industrial injury, reaches maximum medical healing, and then suffers a subsequent injury on another insurer's watch, the subsequent insurer is liable for the worker's medical condition even though the prior injury substantially contributed to the condition. *EBI/Orion Group v. State Compensation Insurance Fund,* 240 Mont. 99, 104, 782 P.2d 1276, 1279; *Belton v. Carlson Transport,* 202 Mont. 384, 387-391, 658 P.2d 405, 407-409 (1983). Obversely, where an injured worker reaches maximum medical healing after an industrial injury, the insurer liable for that injury is not liable for "subsequent injuries or conditions." *Caekaert v. State Compensation Ins. Fund*, 268 Mont. 105, 111, 885 P.2d 495, 499 (1994). The same rules apply where a subsequent occupational disease "materially or substantially" contributes to the claimant's condition. *Id.* at 112, 885 P.2d at 499.

Since disputes may arise as to whether a worker has reached maximum healing or has suffered a subsequent injury, the burden of initially paying benefits as between two insurers falls on the insurer which is at risk at the time of the accident for which a compensable injury is claimed, which is generally the subsequent insurer. Language from *Belton v. Carlson Transport,* 202 Mont. 384, 409-410, 658 P.2d 405, 409 (1983), suggests that the second insurer has little choice but to pay benefits, at least where the fact of the accident is reasonably clear:

> We hold that the burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed. This holding assures that claimant will always know which insurer he can rely on to pay the benefits. **It is the duty of the insurance company on risk to pay the benefits until it proves, or until another insurance company agrees, that it should pay the benefits**. [Emphasis added.]

In light of the duty placed on the insurer at risk, the Court in *Belton* went on to finish the foregoing paragraph by addressing the right to indemnification:

> If it is later determined that the insurance company on risk at the time of the accident should not pay the benefits, this insurance company, of course, has a right to seek indemnity from the insurance company responsible for the benefits already paid out to the claimant.

Id.

Indemnification is an equitable principle. "The right of 'indemnity' is that where one is compelled to pay money which, in justice, another ought to pay, the former may receive from the latter the sums so paid . . . ." *EBI/Orion,* 240 Mont. at 104, 782 P.2d at 1279 (1989).

Although not specifically denominated as such, *EBI/Orion* lays out four elements which must be proved to establish a right to indemnity in a workers' compensation case. First, the insurer must establish that it has in fact made payments to the claimant. *Id*. at 104, 1782 P.2d at 1279. Second, it must show that when it made the payments it had "potential liability" for such payment. *Id*. Third, it must prove that the payment was reasonable. *Id*. Finally, it must show that in fact the other insurer is liable to claimant. *Id*.

I have searched Supreme Court decisions concerning indemnification and have been unable to find any fifth element which requires an insurer seeking indemnification to expressly invoke section 39-71-608, MCA, or give notice that it is paying benefits under a reservation of rights. If such a requirement is to be added, it is more appropriately inserted by the Supreme Court. I therefore conclude that the January 23, 1995 acceptance without reservation does not bar the present claim for indemnification.

IT IS HEREBY ORDERED that the Motion for Summary Judgment is **denied**.

Dated in Helena, Montana, this 27th day of March, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Bradley J. Luck
Submitted: February 28, 1996

1. The response states that the industrial accident occurred March 2, 1992, while both the petition and the claim state that it occurred March 30, 1992. The discrepancy is not material to the present motion. We use the date stated on the claim.