

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 51

WCC No. 9707-7782

LUMBERMENS MUTUAL CASUALTY COMPANY

Petitioner/Insurer for

BUTTREY FOOD & DRUG

Employer

vs.

CHARLES E. MARES

Respondent.

ORDER DISMISSING PETITION

Summary: Insurer filed petition seeking determination that claimant's current medical and psychological conditions are not related to a work injury and that the insurer's liability for that work injury has ended. It also sought judgment that claimant reimburse it for medical and psychological benefits paid under a reservation of rights. Citing *Champion International Corp. v. Brennan*, WCC No. 9504-7269 (1995), claimant moved to dismiss the petition as an improper preemptive strike by the insurer and for failure to mediate the third issue.

Held: Claimant's motion to dismiss is granted. As established in *State ex rel. Industrial Ind. Co. v. District Court*, 169 Mont. 10, 14, 544 P.2d 438 (1975), "ordinarily a court will refuse a declaratory judgment action which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action." Here, as in *Champion*, the insurer is no longer paying benefits, the claimant has not petitioned the Court, and he may never do so. In those circumstances, where the matter involves a factual dispute, the Court will not force a claimant to settle or litigate at the direction of the insurer. The third claim is dismissed for failure to mediate the particular issue of reimbursement.

Topics:

Declaratory Judgment: Pre-emptive Strikes. Insurer's petition for declaratory judgment on claimant's entitlement to continued benefits for conditions insurer

alleged were not related to work injury was dismissed as improper preemptive strike. As established in *State ex rel. Industrial Ind. Co. v. District Court*, 169 Mont. 10, 14, 544 P.2d 438 (1975), "ordinarily a court will refuse a declaratory judgment action which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action." Here, as in *Champion International Corp. v. Brennan*, WCC No. 9504-7269 (1995), the insurer is no longer paying benefits, the claimant has not petitioned the Court and may never do so, and the underlying dispute involves factual matters.

Mediation. Claim for reimbursement contained within insurer's petition for declaratory judgment dismissed for failure to mediate that particular issue.

The petition in this matter was filed by the insurer, Lumbermens Mutual Casualty Company (Lumbermens). According to the petition, the respondent/claimant (claimant) was injured in a motor vehicle accident on November 5, 1991, while working for Buttrey Food and Drug Company, which Lumbermens insured. (Petition for Trial, ¶ A.) The accident occurred in Billings. (*Id.* ¶ B.) Lumbermens accepted liability for the accident, but it now seeks to limit seeks to limit its liability. Specifically, it seeks the following relief:

- (1) A judgment determining that claimant's "current medical and psychological conditions are not related to his injury on November 5, 1991."
- (2) A declaratory judgment determining that its "liability for any benefits as a result of the November 5, 1991 injury has ended."
- (3) A judgment ordering claimant to reimburse it for medical and psychological benefits it has paid under a reservation of rights.

(*Id.* at 2.)

Claimant has responded to the petition with various motions. Initially, he moves to dismiss the petition. (Respondent's Motion to Dismiss, to Change Venue, and for Attorneys Fees; Or, in the Alternative, to Join Additional Parties.) In the event his motion to dismiss is denied, he moves for a change of venue and to join additional parties. (*Id.*) He supplements the foregoing motions with a motion for a protective order staying discovery until his substantive motions are decided and, in the event the Court denies his motion to dismiss, then for a new scheduling order. (Respondent's Motion to Vacate Scheduling Order and Motion for Protective Order.)

Discussion and Resolution

Since the Court finds the motion to dismiss meritorious, it will limit its discussion to that motion.

I.

Citing *Champion International Corp. v. Brennan*, WCC No. 9504-7269 (June 13, 1995), claimant moves to dismiss Lumbermens' first two claims on the ground that they are preemptive strikes. In *Brennan* this Court dismissed an insurer's petition seeking a determination that the claimant was *not* entitled to further benefits. The insurer was not paying benefits at the time of the petition; thus, it was not seeking to terminate ongoing benefits, rather it sought to limit its future liability. This Court dismissed the petition, holding:

The cause of action in this case belongs to the claimant, not to the insurer. It is he who, under the Workers' Compensation Act, may be entitled to benefits for work-related injuries. Thus, the insurer's petition is one for declaratory judgment. "The purpose of declaratory relief is to liquidate uncertainties and controversies **which might result in future litigation** and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined." *In re Dewar*, 169 Mont. 437, 444, 548 P.2d 155 (1976) (emphasis added). Courts are not required to entertain every action for declaratory judgment. Even though all of the necessary elements of jurisdiction exist, the Court may, in its sound discretion, dismiss the action. *Brisendine v. Montana Department of Commerce*, 253 Mont. 361, 364, 833 P.2d 1019 (1992).

A declaratory judgment was never intended "to provide a substitute for other regular actions." *In re Dewar*, 169 Mont. at 444. Its primary purpose is "to determine the meaning of a law or a contract and to adjudicate the rights of the parties therein, but not to determine controversial issues of fact" *Raynes v. City of Great Falls*, 215 Mont. 114, 121, 696 P.2d 423 (1985); accord *Remington v. Department of Corrections*, 255 Mont. 480, 483, 844 P.2d 50 (1992). The Montana Supreme Court has adopted the general rule from C.J.S. on declaratory judgments in *State ex rel. Industrial Ind. Co. v. District Court*, 169 Mont. 10, 14, 544 P.2d 438 (1975). It said "'ordinarily a court will refuse a declaratory judgment which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action.'" (Quoting 26 C.J.S. Declaratory Judgments, section 16, page 81.)

Champion's response to the order to show cause confirms that its petition raises significant factual issues. It says, "The parties have significant differences of opinion on material facts and legal interpretations dealing with entitlement." (Consolidated Reply to Court's Orders to Show Cause at 4.) Factual issues are more appropriately raised in an action commenced by a claimant for benefits, not in a declaratory judgment action.

It is also uncertain whether claimant ever will pursue any action for further benefits. It is by no means certain that an adjudication concerning any of his claims will ever be required. Courts should not "determine matters purely speculative, enter anticipatory judgements, . .

. adjudicate academic matters, . . . [or] provide for contingencies which may hereafter arise" *Department of Natural Resources & Conservation v. Intake Water Co.*, 171 Mont. 416, 440 (1976).

Champion cites a number of cases in support of its contention that it is entitled to pursue its present petition. All but one of the cited cases are distinguishable because they concern concrete claims for indemnification as between insurers, *EBI/Orion Group v. State Compensation Mutual Insurance Fund*, 249 Mont. 449, 816 P.2d 1070 (1991); for repayment where the insurer has overpaid, *Champion International Corp. v. McChesney*, 239 Mont. 287, 779 P.2d 527 (1989) and *Aetna Life & Casualty Co. v. Main*, WCC No. 9112-6315 (decided July 21, 1992); for amounts allegedly due the insurer as a result of settlement of a third party action, *State Compensation Mutual Insurance Fund v. Mordja*, WCC No. 9202-6391 (decided September 16, 1992); or for repayment of amounts paid due to a claimant's fraud, *State Compensation Mutual Insurance Fund v. Chapman and Pyfer*, WCC No. 9207-6543 (decided September 1, 1993). The last cited case, *Connecticut Indemnity Co. v. Nerpel*, WCC No. 9206-6464 (decided June 30, 1993), did not address the appropriateness of an action brought by the insurer. It established no precedent with regard to the present question.

I conclude that the petition in this matter is an inappropriate action for a declaratory judgment and should be dismissed. The insurer cannot force a claimant to settle or litigate just so it can close its files. (*Id.* at 2-3.)

Lumbermens' first two requests for relief are indistinguishable from the request made in *Brennan*. At this point of time, claimant has not petitioned the Court for further benefits. He may never do so. Lumbermens cannot force him to do so. Lumbermens' first two causes of action must therefore be dismissed.

II.

As to Lumbermens' third request for relief, claimant alleges that the request was not mediated. In his reply brief, he provides copies of the requests for mediation. Neither of the two requests concern repayment of medical benefits paid by Lumbermens under a reservation of rights.

Mediation is a prerequisite to invoking this Court's jurisdiction to adjudicate disputes involving workers' compensation benefits. Mediation is mandatory and must be completed before a party may petition the Court for relief. Section 39-71-2401(1), MCA (1991), provides in relevant part:

(1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the

mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

Section 39-71-2408(1), MCA (1991), provides in relevant part:

(1) Except as otherwise provided, in a dispute arising under chapter 71 or 72 of this title, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.

39-71-2905, MCA (1991), provides in relevant part:

A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter.

In previous cases, this Court has held that the mediation must address the specific issue raised in the petition. "Parties cannot mediate one issue, then petition the Court with respect to other, non-mediated issues." *Debbie Gallup v. State Compensation Ins. Fund*, WCC No. 9604-7537, Order Dismissing Petition (5/21/96) at 2-3.

In this case, the parties have mediated only two issues. As set forth in the mediation notices attached to Insurer's Response to Respondent's Motion to Dismiss, to Change Venue, and for Attorneys Fees; Or, in the Alternative, to Join Additional Parties and Respondent's Motion to Vacate Scheduling Order and Motion for Protective Order, the issues mediated were:

[W]hether or not Mr. Mares [claimant] is entitled to further psychological treatment for the effects of his industrial injury.

[C]ompensability of Mr. Mares' future medical and compensation benefits.

(*Id.*, Exs. A and B.) While the factual dispute underlying Lumbermens' claim for reimbursement *might* be the same dispute underlying the mediated issues, the factual underpinnings for the dispute may also be unrelated to the two mediated issues. What transpired in the mediation is confidential. § 39-71-2410, MCA. Therefore, the Court cannot inquire into the actual mediation proceedings to determine if the unmediated issue overlaps the mediated issues. The reimbursement issue must be separately mediated and is therefore premature.

ORDER

For the reasons set forth in the forgoing discussion, the petition is **dismissed**.

DATED in Helena, Montana, this 19th day of September, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Sara R. Sexe

Mr. Thomas J. Murphy

Submitted: September 16, 1997