IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 64

WCC No. 2004-1035

EDWARD F. McMANUS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

DARYLE WAGNER and

SCHAFER'S WILD GAME PROCESSING, INCORPORATED

Respondents/Alleged Employer.

ORDER DISMISSING UNINSURED EMPLOYERS' FUND

Summary: The claimant petitioned the Court for damages on account of his employer's failure to re-employ him after he had been released to return to work following a workers' compensation injury. The Court served the Uninsured Employers' Fund (UEF) with the petition since the petition also alleged that the employer was uninsured. In its response, the UEF requested that it be dismissed since the claim is against the employer.

Held: A claim for retaliatory discharge or for failure to give the claimant a preference for a job opening is against the employer, and does not state a claim for relief against either the employer's insurer or the UEF (in the event the employer is uninsured). The UEF is therefore dismissed from the action.

Topics:

Employment: Retaliatory Discharge. Section 39-71-317, MCA (1999-2003), makes it unlawful for an employer to discharge an employee for pursuing a workers' compensation claim, however, any action for violating the prohibition must be brought in district court.

Employment: Rehire Preference. An employer must give an injured worker a two-year rehiring preference for any job opening occurring within two years of the worker's industrial accident if the worker is qualified for and able to perform the job.

An employer is liable for damages for any failure to give the worker a preference as required and the Workers' Compensation Court has jurisdiction over such action. § 39-71-317, MCA (1999-2003).

Jurisdiction: Retaliatory Discharge. Section 39-71-317, MCA (1999-2003), makes it unlawful for an employer to discharge an employee for pursuing a workers' compensation claim, however, any action for violating the prohibition must be brought in district court.

Jurisdiction: Rehire Preference. An employer must give an injured worker a two-year rehiring preference for any job opening occurring within two years of the worker's industrial accident if the worker is qualified for and able to perform the job. An employer is liable for damages for any failure to give the worker a preference as required and the Workers' Compensation Court has jurisdiction over such action. § 39-71-317, MCA (1999-2003).

Jurisdiction: Rehire Preference. Any action for an employer's failure to honor the two-year rehiring preference specified in section 39-71-317(2), MCA (1999-2003), is against the employer and not against the employer's insurer or the Uninsured Employers' Fund if the employer was uninsured.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-317, MCA (1999-2003). Section 39-71-317, MCA (1999-2003), makes it unlawful for an employer to discharge an employee for pursuing a workers' compensation claim, however, any action for violating the prohibition must be brought in district court.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-317, MCA (1999-2003). An employer must give an injured worker a two-year rehiring preference for any job opening occurring within two years of the worker's industrial accident if the worker is qualified for and able to perform the job. An employer is liable for damages for any failure to give the worker a preference as required and the Workers' Compensation Court has jurisdiction over such action. § 39-71-317, MCA (1999-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-317, MCA (1999-2003). Any action for an employer's failure to honor the two-year rehiring preference specified in section 39-71-317(2), MCA (1999-2003), is against the employer and not against the employer's insurer or the Uninsured Employers' Fund if the employer was uninsured.

¶1 The petitioner in this case alleges he was injured on October 13, 2003, while working for Schafer's Wild Game Processing, Incorporated (Schafer's). He alleges that Schafer's refused to allow him to return to work after he was released by his physician and seeks

damages on account of that refusal. He named Schafer's as a respondent in the case, along with Daryle Wagner, who is apparently someone involved in the operations or ownership of Schafer's.

¶2 Because the claimant alleged that Schafer's was uninsured, the Court served the petition on the Uninsured Employers' Fund (UEF). The UEF thereafter filed a response to the petition. In its response, it asked that it be dismissed from the action since the action is against the employer for damages and not for benefits.

¶3 Although the UEF has filed no formal motion to dismiss, and the matter has not been briefed, I will treat its request for dismissal as a motion to dismiss for which no briefing is required. I do so because the UEF was not formally named in the petition and the failure to state a claim against the UEF is patent from the petition itself.

¶4 As the UEF correctly points out, the petition is not seeking benefits, rather it is seeking damages from the employer on account of its failure to re-employ the claimant. This Court's jurisdiction over his petition is governed by section 39-71-317, MCA (1999-2003), which provides:

> 39-71-317. Employer not to terminate worker for filing claim -- preference -- jurisdiction over dispute. (1) An employer may not use as grounds for terminating a worker the filing of a claim under chapter 72 or this chapter. The district court has exclusive jurisdiction over disputes concerning the grounds for termination under this section.
> (2) When an injured worker is capable of returning to work within 2 years from the date of injury and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker's physical condition and vocational abilities.
> (3) This preference applies only to employment with the employer for whom the employee was working at the time the injury occurred.
> (4) The workers' compensation court has exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference under this section. A dispute concerning the reemployment preference is not subject to mediation or a contested case hearing.

This section provides for two distinct sorts of legal actions. The first is for wrongful termination in retaliation for filing a workers' compensation claim: District courts have exclusive jurisdiction over any wrongful discharge claim. The second sort of action is for a failure to rehire for a vacant position which the claimant is able and qualified to perform. Such action arises only if the claimant was terminated for non-retaliatory reasons, such as where his position was filled due to the employer's need to hire another in light of the

claimant's lengthy absence, or where the claimant is unable to return to his time-of-injury job on account of his injury. This Court has jurisdiction over this second sort of action.

¶5 In the present case, the petition states a cause of action under one or the other grounds listed in section 39-71-317, MCA (1999-2003). If the cause of action is for retaliatory discharge, then this Court does not have jurisdiction over the claim. If it is for a failure to re-hire the claimant for a job which became open after the claimant was released to return to work, then this Court does have jurisdiction. In either event, the claim pled by the petition does not involve benefits and is against the employer. The petition on its face fails to state a claim against the UEF and it should therefore be dismissed as a party to the action.

ORDER

¶6 For the reasons set out above, the Uninsured Employers' Fund is dismissed as a party to this action.

DATED in Helena, Montana, this 22nd day of September, 2004.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Edward F. McManus
Ms. Julia W. Swingley
Mr. Joe C. Maynard
Submitted: August 30, 2004