IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 2

WCC No. 2008-2046

KATHY BENTON

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

ROBERT and SUSAN HARRYMAN of Oregon

Respondent/Uninsured Employer.

ORDER DENYING PETITIONER'S AMENDED MOTION FOR RECONSIDERATION AND MOTION FOR ADDITIONAL DISCOVERY

Summary: On August 14, 2008, this Court granted Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation of Oregon's ("Rogue") motion for summary judgment. As a result, Rogue was dismissed from the case with prejudice. Petitioner moves for reconsideration. Petitioner argues that pursuant to the Court's Order in *Raymond v. Uninsured Employers' Fund*, this Court lacked jurisdiction to grant Rogue's motion for summary judgment. Petitioner also argues that the alleged uninsured employers lack standing to appear in the present action. As a result, Petitioner argues the Court should strike *ab initio* all pleadings, arguments, or facts submitted by the alleged uninsured employers. Petitioner also requests a stay of the Court's Order so that Petitioner may complete additional discovery.

Held: The Uninsured Employers' Fund ("UEF") joined in Rogue's motion for summary judgment and Petitioner does not argue that the UEF is not a proper party to this action. Therefore, the Court has jurisdiction to consider the motion for summary judgment as a motion brought by the UEF. Accordingly, Petitioner's motion for reconsideration is denied. With respect to Petitioner's request to complete additional discovery, Petitioner has failed

to articulate how the proposed discovery could preclude summary judgment in the UEF's favor. Therefore, Petitioner's request for additional discovery is denied.

Topics:

> **Summary Judgment: Motion for Summary Judgment.** Where the UEF joined in Respondent's motion for summary judgment and Respondent was subsequently dismissed as a party, judicial economy is not served by requiring a pro forma "do over" of the motion and order, irrespective of whether Respondent was a proper party to the action. The UEF's joinder in the employer's motion renders the issue of whether the employer was a proper party at the time it filed the motion moot.
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> **Procedure: Parties.** Where the UEF joined in Respondent's motion for summary judgment and Respondent was subsequently dismissed as a party, judicial economy is not served by requiring a pro forma "do over" of the motion and order, irrespective of whether Respondent was a proper party to the action. The UEF's joinder in the employer's motion renders the issue of whether the employer was a proper party at the time it filed the motion moot.

¶ 1 On August 14, 2008, the Court issued an Order granting summary judgment in favor of Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation ("Rogue").[1] As a result, Rogue was dismissed from this case with prejudice. Petitioner now moves the Court for reconsideration arguing that, pursuant to this Court's recent decision in *Raymond v. UEF,*[2] this Court lacked jurisdiction to grant Rogue's motion. Petitioner further argues that, in light of *Raymond*, the alleged uninsured employers lack standing to appear in the present action. Petitioner contends that the Court should therefore strike, *ab initio,* all pleadings, arguments, or facts submitted by the alleged uninsured employers.

¶ 2 Prior to *Raymond*, this Court recognized that judicial economy was best served by making the alleged uninsured employer a party to any action involving UEF benefits.[3] However, in *Raymond* – a decision issued after the Order granting Rogue's motion for summary judgment – I determined that this Court does not have jurisdiction over a dispute between a claimant and an alleged uninsured employer pursuant § 39-71-516, MCA, and any dispute between the UEF and an alleged uninsured employer must follow the

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[1] *Benton*, 2008 MTWCC 41.

[2] *Raymond*, 2008 MTWCC 45.

[3] *Id.*, ¶ 9.

procedure mandated by § 39-71-506, MCA.[4] In *Raymond*, therefore, I dismissed the alleged uninsured employer because he was not a proper party to the action.[5]

¶ 3 On May 2, 2008, Rogue filed a motion to dismiss and a motion for summary judgment arguing that it was not an "employer" in Montana pursuant to § 39-71-117(4), MCA.[6] On May 15, 2008, the UEF filed a response brief in which the UEF joined in Rogue's motion.[7] Specifically, the UEF stated:

> The UEF agrees with and joins in Rogue Transportation's Motion for Summary Judgment, on the grounds that pursuant to § 39-71-117(4), MCA, Rogue Transportation is not an "employer in this state".[8]

¶ 4 Irrespective of whether Rogue was a proper party to this action at the time it filed its motion for summary judgment, the UEF's joinder in Rogue's motion renders this issue moot. Even Petitioner recognizes that requiring the UEF to re-file a summary judgment motion would essentially be a "do over" for purposes of testing Rogue's status as an "employer" under Montana law.[9] Judicial economy is not served by requiring a pro forma "do over."

¶ 5 Petitioner further requests that if the Court determines that it had jurisdiction to consider the summary judgment motion, a final ruling on the motion should be held in abeyance to permit Petitioner to complete discovery. I previously denied this request in my Order granting Rogue's motion for summary judgment. In doing so, I noted that the Court has wide discretion to order discovery in certain circumstances pursuant to ARM 24.5.329(8), which is identical to Rule 56(f), Mont. R. Civ. P. I specifically noted that I was denying Petitioner's request because she had failed to both propose the discovery she sought and establish how the proposed discovery could preclude summary judgment in

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[4] *Id*., ¶ 10.

[5] *Id*., ¶¶ 10, 14.

[6] [Respondent Rogue's] Motion to Dismiss/Motion for Summary Judgment and Brief in Support, Docket Item No. 17.

[7] Uninsured Employers' Fund's Response Brief on Rouge [sic] Transportation's Motion for Summary Judgment, Docket Item No. 26.

[8] *Id*. at 2.

[9] *See* [Petitioner's] Amended Combined Motion for Reconsideration and Strike [sic] and Brief in Support ("Petitioner's Motion for Reconsideration") at 5 n. 4, Docket Item No. 47.

accordance with the rule.[10] In her motion for reconsideration, Petitioner requests additional discovery in the form of depositions of Rogue and the Harrymans.[11] Notwithstanding the Court's specific admonition in denying Petitioner's original request to complete additional discovery, Petitioner still fails to articulate ***how*** the proposed discovery could preclude summary judgment.[12] Therefore, Petitioner's request to hold this Order in abeyance is not well-taken.

ORDER

¶ 6 Petitioner's motion for reconsideration is **DENIED**.

¶ 7 Petitioner's request to conduct additional discovery is **DENIED**.

DATED in Helena, Montana, this 16th day of January, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James P. O'Brien
Mark Cadwallader
Charles G. Adams
Kelly M. Wills (courtesy copy)
Submitted: November 7, 2008

[10] *Benton,* 2008 MTWCC 41, ¶ 13.

[11] Petitioner's Motion for Reconsideration at 3 and 5 n. 4.

[12] UEF points out in its brief that Petitioner's discovery was served after the filing of the motion for summary judgment and after the deadline set by this Court for service of discovery. Since Petitioner has failed to comply with ARM 24.5.329(8), however, I need not address this issue.