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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

Robert Flynn and *Carl Miller*, Individually and on Behalf of Others Similarly Situated, Petitioners, v. *Montana State Fund*, Respondent/Insurer, and *Liberty Northwest Insurance Company*, Intervenor.	WCC No. 2000-0222 ***REPLY BRIEF IN SUPPORT OF PETITIONERS' MOTION TO AMEND PETITION FOR HEARING***

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The Petitioners respectfully submit this reply brief in support of their motion to amend their Petition.

Introduction

Petitioners seek to amend the Petition to include a request for penalties and attorney fees for the Insurers' delay in identifying and paying claims.

The Insurers concede the single most important point regarding this procedural motion. That is, Rule 15, M.R.Civ.P., is applicable here.[1]

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[1] See p. 3-4, Insurers' Brief. See also *Wood v. Mont. State Fund*, 2007 MTWCC 53, ¶ 3; *Higgins v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 31, ¶ 6.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." It is well established that this rule "is to be interpreted liberally so that the allowance of amendments is the general rule and denial the exception." [2] Thus, the Insurers expressly concede that Rule 15 is "applied liberally to allow amendments." [3] However, they nonetheless argue that this rule does not apply here.

Justice requires that the Petitioners be allowed to amend. The conduct at issue—the Insurers' delay in identifying and paying claims—has occurred over the past period of months. Thus, the allegations based on this conduct could not have been raised in the original Petition.

The Insurers argue that they cannot be penalized because they retain the right to contest claims. This argument ignores a critical fact: the Insurers are not at liberty to ignore *all* the claims simply because they contest *some* of them. More importantly, however, the Insurers' argument addresses the substantive issues regarding a penalty and attorney fees; it does not address the procedural matter that is presently before the Court.

Argument

This procedural motion does not concern the substantive issue of whether penalties and attorney fees should ultimately be assessed against the Insurers.

The sole issue here is one of procedure. Yet, the bulk of the Insurers' arguments address a substantive issue that is not raised and cannot be resolved in this motion. Under headings I, II, and V of their brief, the Insurers argue the substantive merits of the issue of whether penalties and attorney fees should ultimately be imposed. This argument stems from a fundamental misunderstanding of the issue raised in this motion.

The Petitioners are not here seeking to litigate the issue of whether penalties and attorney fees should ultimately be assessed against the Insurers. Rather, the Petitioners here seek only to amend the Petition to raise that issue for eventual determination.

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[2] *Allison v. Town of Clyde Park*, 2000 MT 267, ¶ 20.

[3] See p. 4, Insurers' Brief.

Thus, the only issue raised here is a procedural matter. The substantive merits of the matter of penalties and attorney fees simply is not an issue here. Indeed, it cannot be an issue in this litigation unless the Petitioners are first allowed to amend their Petition in order to later present that issue on the merits. Yet, the Insurers would have this Court prematurely address the merits of this issue: (1) before even determining whether the Petitioners can amend their Petition to present that issue; and (2) before the Court has allowed discovery that would permit something more than a basic exploration of this issue.[4] The Insurers' approach is fundamentally wrong.

The Court should disregard all these arguments made by the Insurers, because they are not relevant to this procedural motion. For example, the Insurers argue that the Petitioners "fail to offer any evidence" of unreasonable conduct. Of course, it is true that the Petitioners have not offered such evidence here. That is because it would be wrong to present evidence on that matter *before* the Court has even determined whether the Petitioners can present this matter for resolution on the merits. This demonstrates just how far off base the Insurers' arguments are.

The Court should disregard the entirety of the Insurers' arguments under headings I, II, and V of their brief. Those arguments address the substantive matter of ultimately assessing penalties and attorney fees, rather than the sole procedural matter raised in this motion.

This motion is not governed by § 24.5.301, A.R.M.

Under heading III of their brief, the Insurers argue that the Petition does not comply with § 24.5.301, ARM. That rule sets forth the various items that must be contained in a petition for trial. The Insurers claim that the Petition here fails to "provide any of the details required" by the rule. However, this rule is not relevant to the issue raised in this motion. The Petitioners are not filing a petition for trial.

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[4] The Court has already laid the groundwork for the discovery necessary to address the Insurers' conduct. The Court has, for the time being, denied the Petitioners' request to depose the Insurers, but it has expressly held that Petitioners "will be granted leave to renew this motion contingent on the ruling on the central issue of 'paid in full.' " See p. 2-3, Minutes of Hearing No. 4054, Vol. XVII, April 22, 2009.

Rather, they have already filed their Petition, and they simply seek to amend it. The rule, § 24.5.301, does not address amendments to a petition. Thus, it has no applicability here, and once again the Insurers' arguments are not relevant to the issue raised in this motion.

This motion is not untimely.

Under heading IV, the Insurers present their only argument that actually addresses the procedural issue in this motion. The Insurers argue that this motion to amend is untimely. In support of this argument, they present two assertions.

First, the Insurers assert that no amendment should be permitted because the Petition "has been fully and finally adjudicated." The Insurers provide no explanation to support this assertion. Nor do they cite any supporting authority. The assertion is incorrect as a matter of fact. This litigation is ongoing, as demonstrated by the numerous matters which are presently being contested. For example, this Court issued a briefing schedule for the express purpose of addressing issues that remain to be litigated.[5] Additionally, the Insurers have expressly stated, on the record, that following the *Schmill* decision they retain the option of raising "additional implementation and substantive arguments." [6] Further, the Insurers' own brief here acknowledges that they are still employing defenses which "are now being briefed." [7] Thus, it is obviously incorrect to assert that this action is "fully and finally adjudicated" when we are in fact mired in ongoing litigation. If this matter were really "fully and finally adjudicated" as the Insurers assert, then the present motions would not be pending before this Court—including the Insurers' own motion.

The Court should not be burdened with such a nonsensical and baseless "argument." The Insurers' assertion is disingenuous and patently frivolous. It is an unmitigated waste of this Court's time, and the Insurers should be admonished for this frivolity.

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[5] See p. 2, Minutes of Hearing No. 4054, Vol. XVII, April 22, 2009.

[6] See p. 2, Minutes of Hearing No. 4054, Vol. XVII, April 22, 2009.

[7] See p. 2, Insurers' Brief.

Second, the Insurers assert that no amendment should be permitted because it would allow the Petitioners to advance "a new theory on unsuspecting opponents." Of course, it *is* a new theory, as it necessarily *must* be because it is based on the Insurers' conduct over the past period of months. However, the Insurers cannot claim to be "unsuspecting." They know full well of their obligation to act reasonably with respect to benefit entitlements. They are not at liberty to do nothing with *all* the claims simply because they contest *some* of them.

The Insurers cite *Schneider v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 34, for the notion that Petitioners here should not be permitted to amend. However, that case addressed an attempt to amend the pleadings *after the trial was conducted.* See *Schneider*, ¶ 1. The decision has no relevance here. There is, however, authority that is analogous to this litigation. This Court has held that where new matters come to light during the litigation, it may be proper to allow amendment of the petition. In *Wood v. Mont. State Fund*, 2007 MTWCC 53, ¶ 3, the Court allowed Petitioners to amend because they learned new facts during discovery. This was deemed to be "a sufficient reason to allow amendment of the petition to reflect the newly-gleaned information." See *Wood*, ¶ 3. Similarly here, the Insurers' conduct has come to light during the course of this litigation. The Petitioners could not have raised this matter when the Petition was initially filed. They should not now be faulted for failing to foresee the Insurers' future conduct. Indeed, the law does not require impossibilities. See § 1-3-222. MCA.

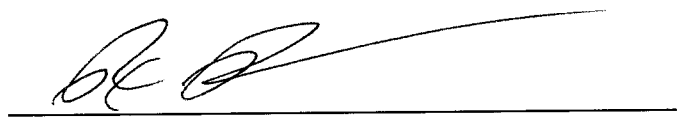
Conclusion

The bulk of the Insurers' arguments should be disregarded because they address a substantive issue that is not raised here, and they do not address the sole procedural issue in this motion.

As for the Insurers' arguments that actually address the procedural issue raised here, those arguments are wholly without merit.

It is undisputed that leave to amend under Rule 15(a) "shall be freely given when justice so requires." Here, justice requires that the Petitioners be allowed to amend. Because the conduct at issue has occurred over the past period of months, the allegations based on this conduct could not have been raised in the original Petition. The Petitioners should be allowed to amend their petition.

DATED this 9th day of December, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December 2009, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

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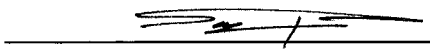

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December 9, 2009

Clara Wilson, Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: *Flynn/Miller* WCC No. 2000-0222

Dear Ms. Wilson:

Attached is a copy of the REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION TO AMEND PETITION FOR HEARING dated December 9, 2009.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.

Rex Palmer

Rex Palmer

RP:sp
Enclosure