IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 22

WCC No. 2004-1135

KAREN LANZ

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

BOZEMAN DEACONESS HEALTH SERVICES

Employer.

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

Summary: Respondent employer moves for judgment on the pleadings with respect to a re-employment preference claim, urging that the preference applies only to injuries and not to occupational diseases.

Held: The motion is denied where the petition, construed most favorably to the petitioner, alleges a workers' compensation injury.

Topics:

Pretrial Procedure: Judgment on the Pleadings. For purposes of a motion for judgment on the pleadings, the facts alleged in the petition are construed in a light most favorable to the petitioner and deemed true.

Re-employment Preference. The re-employment preferences, section 39-71-317, MCA (1999), do not apply to occupational diseases.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-317, MCA (1999). The re-employment preferences, section 39-71-317, MCA (1999), do not apply to occupational diseases.

¶1 The petitioner seeks back wages from her employer, Bozeman Deaconess Health Services (Bozeman Deaconess), on account of its alleged failure to give her an employment preference pursuant to section 39-71-317, MCA (1999).[1] In the alternative, the petitioner alleges that she is permanently totally disabled and seeks permanent total disability benefits from Bozeman Deaconess' insurer, Liberty Northwest Insurance Corporation (Liberty Northwest). Bozeman Deaconess moves for judgment on the pleadings with respect to the claim against it.

Employment Preference Statute

¶2 The employment preference is found in section 39-71-317, MCA (1999), which provides in relevant part:

> (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.

§ 39-71-317, MCA (1999). The Workers' Compensation Court has exclusive jurisdiction over disputes concerning the preference. § 39-71-317(4), MCA (1999).

Factual Background

¶3 Since the motion is for judgment on the pleadings, the allegations of the petitioner are deemed true for purposes of the petition and construed in a light most favorable to the petitioner. *Paulson v. Flathead Conservation Dist.,* 2004 MT 136, ¶ 17, 321 Mont. 364, 91 P.3d 569.

---

[1]According to the Petition for Hearing, the petitioner was diagnosed with a herniated disk in the summer of 2000. Her claim was initially denied as non-compensable under the Workers' Compensation Act but later accepted under the Occupational Disease Act. Since her condition arose in 2000, the 1999 versions of the two acts apply .

¶4 According to her petition, the petitioner suffered a herniated disk in the summer of 2000 while she was employed as a Registered Nurse at Bozeman Deaconess. (Amended Petition for Hearing, ¶ 1.) She submitted a claim for compensation to Liberty Northwest, which treated the claim as one for workers' compensation benefits and denied liability. (*Id.*, ¶¶ 4-6.) Thereafter, her claim was accepted as an occupational disease. (*Id.*, ¶ 16.)

¶5 On October 1, 2001, the petitioner was released to return to work with restrictions. (*Id.,* ¶ 18.) She in fact returned to work but apparently in a light-duty position different from her time-of-injury job. (*See Id.*, ¶ 18-19.) The light-duty position ended on May 28, 2002. (*Id.*, ¶ 19.) On that date, and thereafter, the petitioner applied for other positions for which she was qualified but was not hired. (*Id.*, ¶ 20.)

Discussion

¶6 A party moving for judgment on the pleadings must establish that on the face of the petition "no material issue of fact remains and that the movant is entitled to judgment as a matter of law." *Paulson, supra.*, ¶ 17.

¶7 Citing *Lueck v. United Parcel Service,* 258 Mont. 2, 851 P.2d 1041 (1993), Bozeman Deaconess contends that the petition against it must be dismissed because the employment preference does not apply to occupational diseases. In *Lueck,* the Montana Supreme Court expressly held that the preference applies only to injuries arising under the Workers' Compensation Act and not to occupational diseases:

> Lueck argues that his condition was caused by "physical disruption of his eating and sleeping schedule" and therefore is not excluded. The District Court concluded correctly, however, that the term "injury" in the preference statute, § 39-71-317(2), MCA, does not include occupational disease.
>
> Lueck contends that the District Court's reading of the preference statute is too narrow, and that it erred in ignoring the declaration of public policy in § 39-71-105(3), MCA (1987), which states that "an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease." UPS argues that this objective does not apply to an occupational disease, for there is no good reason to return a worker to a job that caused his disease. The District Court agreed, concluding correctly that the preference statute applies only to work-related injuries.
>
> We review a district court's interpretation of the law only for correctness. *Steer, Inc. v. Dep't of Revenue* (1990), 245 Mont. 470, 803

> P.2d 601. Here, we conclude that the District Court correctly interpreted the preference statute as excluding Lueck's condition, and that UPS therefore was entitled to summary judgment on Lueck's preference claim, as a matter of law.

258 Mont. at 10-11, 851 P.2d at 1046.

¶8 The petitioner argues that her petition still should not be dismissed. She advances three grounds.

¶9 First, she argues that the "preference applies equally if the physical injury was the result of a accident at a discrete point in time or whether the same injury results from repetitive occupational exposure." (Response in Opposition to Motion for Judgment on the Pleadings at 1.) The argument flies in the face of the holding in *Lueck.* While *Lueck* involved the 1987 version of the Workers' Compensation and Occupational Disease Acts, the definitions of injury as arising from a single event on a single day or work shift, § 39-71-119(2), MCA (1987), and occupational disease as "caused by events occurring on more than a single day or work shift," § 39-72-102(10), MCA (1987), remain in effect to this date. The petitioner's first argument is therefore without merit.

¶10 Next, the petitioner argues that her petition must be construed as alleging in the alternative that she suffered an injury rather than an occupational disease. In paragraph 1 she alleges:

> On November 8, 2000 Karen Lanz was working as a Registered Nurse at Bozeman Deaconess Hospital (BDH). Ms. Lanz had been working as a Registered Nurse for BDH for twenty-six and one-half years (26½). During the summer of 2000 Ms. Lanz began to have pain in her right leg and foot which increased until it became so severe that it was excruciating in nature. Ms. Lanz was evaluated and found to have a herniated disc at L5-S1.

(Amended Petition for Hearing, ¶ 1.) She then alleges in paragraph 2 that she underwent emergent surgery on November 10, 2000, and argues that the allegations in these first two paragraphs are sufficient to allege an acute injury occurring on November 8. While her reading of her own petition is a stretch, her subsequent allegations indicating that her claim was initially treated as one for workers' compensation rather than occupational disease benefits lends credence to her contention. The fact that the petitioner is receiving benefits under the Occupational Disease Act is not inconsistent with her present position concerning an injury since the benefits distinctions between the ODA and the WCA have largely if not totally been extinguished as a result of recent Supreme Court decisions in *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456; *Stavenjord v.*

Montana State Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229; and *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, leaving little if any reason to pursue the workers' compensation claim against Liberty Northwest. Since her petition must be construed in a light most favorable to her, and since she indicates her intent to press the injury argument at trial, I find her argument on this point meritorious and sufficient to avoid judgment on the pleadings.

¶11 Finally, the petitioner contends that if she is found to have suffered an occupational disease, then limiting section 39-71-317(2), MCA (1999), to workers' compensation injuries is unconstitutional. In light of the petitioner's injury argument, it is premature to address her constitutional argument. Courts do not rule on constitutional arguments if "able to decide the case without reaching constitutional considerations." *In re Gildersleeve,* 283 Mont. 479, 485, 942 P.2d 705, 709 (1997). The injury issue must therefore be decided before further consideration is given to the petitioner's constitutional challenge.

ORDER

¶12 Respondent Bozeman Deaconess' Motion for Judgment on the Pleadings is **denied**.

DATED in Helena, Montana, this 29th day of April, 2005.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Ms. Lisa Levert
Submitted: April 21, 2005