IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARK A. SMITH, Plaintiff, v. WHEATLAND ELECTRIC COOPERATIVE, INC., Defendant.	)	Civil Action No. 10-CV-1237-KGG

ORDER DENYING DEFENDANT'S MOTION TO JOIN REAL PARTIES IN INTEREST OR IN THE ALTERNATIVE, TO DISMISS THE CASE

Plaintiff claims he sustained injuries caused by the negligence of Defendant's employees while he was unloading steel poles from a flat bed trailer owned by Plaintiff's employer. Plaintiff alleges that his employer, Pelco Structural, L.L.C., has a claim for reimbursement of medical expenses, temporary partial disability, and permanent partial disability paid on Plaintiff's behalf that Pelco is asserting through Plaintiff against Defendant. (Doc. 33, Pretrial Order). This action was brought more than one year after the alleged injury.

Defendant has filed this motion to compel the joinder of Plaintiff's employer Pelco Structural, L.L.C., and its workers compensation insurance carrier, Travelers Property Casualty Company of America, as real parties in interest under Federal

Rules of Civil Procedure 17(a)(1), 19, and 20. In the alternative, Defendant moves for the dismissal of the case for failure to join indispensable parties under Fed. R. Civ. Proc. 12(b)(7).[1]

In support of this motion, Defendant cites general case law supporting the proposition that insurers who have reimbursed insureds for part of their loss, and who have subrogation rights, may be necessary parties. *See generally* ***Gas Service Co. v. Hunt***, 183 F.2d 417 (10th Cir. 1950).[2] In Kansas, however, insurance and employer subrogation rights arising out of workers compensation benefits are governed by K.S.A. § 44-504, which provides in part that "[f]ailure on the part of the injured worker . . . to bring such action within the time specified by this section [one year], shall operate as an assignment to the employer of any cause of action in tort . . . ."

While on its face this statute would seem to bar an action by the employee after one year, the statue has not been so applied by the Kansas courts. Rather, the courts have recognized the continued application of the general two year statute of limitations, and held that when the injured person alleges that the action is brought

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[1] This case is before this Court on assignment through consent of the parties in accordance with 28 U.S.C.§ 636(c) and Fed.R.Civ.P. 73. (Doc. 34).

[2] In its Reply (Doc. 42), Defendant states that the insurer and carrier should be added because there is no indication that their claims are limited to workers compensation benefits. Defendant's original motion, however, is premised on the claim that these were workers compensation benefits, and no evidence or allegations have been presented to the contrary.

for himself, his employer and the insurance carrier, the right of action remains in the worker and is not barred. ***Klein v. Wells***, 194 Kan. 528, 400 P.2d 1002, syl. 5 (1965).

> [D]espite the express language of assignment in § 44-504(c), the construction it has received in the Kansas courts has virtually eliminated any notion of true assignment, except perhaps when the employee shows no inclination to press his cause of action himself and the employer decides to do so in the employer's own name beyond [the one year period].

Miller v. Leavenworth-Jefferson Electric Cooperative, Inc., 653 F.2d 1378, 1382 (10th Cir. 1981).

The federal courts, in recognition of Kansas state court rulings, have long held that where such an allegation is made, the employee's action is not barred. ***Baird v. Phillips Petroleum Company***, 535 F.Supp. 1371, 1375 (D. Kan. 1982). Because the employee continues to own the cause of action, the employer and its carrier are not real parties in interest and need not be added as necessary parties. ***Doyle v. Colborne Mfg Co.***, 93 F.R.D. 536, 537-38 (D. Kan 1982).

Where, however, a plaintiff has failed to allege that the lawsuit is brought for "his benefit and for the benefit of his employer and its insurance carrier as their interests appear," the Court will order that an amendment be made to include that allegation. ***Baird***, 535 F. Supp. at 1374-75. In this case, Plaintiff has made this allegation with regard to the employer, but not as to the insurance carrier. Because

a Final Pretrial Order (Doc. 33) has been filed in this case, the required amendment is directed in the Pretrial Order and will be made by the Court *sua sponte* as a matter of expedience. If, however, Plaintiff does not concur with the amendment, which is made on his behalf, he is directed to file an objection to this order explaining that objection.[3] The Court will then reconsider its denial of the present motion.

IT IS THEREFORE ORDERED that Defendant's motion for joinder or to dismiss is **DENIED**. The third paragraph of Plaintiff's contentions in the Pretrial Order, in paragraph 5.a., is hereby amended as follows: "This action was brought by Mark Smith, individually, and for and on behalf of Plaintiff's employer, Pelco, Inc. and its workers compensation carrier Travelers Property Casualty Company of America, as their interests appear."

IT IS SO ORDERED.

On this 13th day of April, 2012.

S/ KENNETH G. GALE
Kenneth G. Gale
United States Magistrate Judge

[3] Plaintiff should file such an objection if, for example, he feels this is not an allegation he can make in good faith.