IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 40

WCC No. 2000-0250

EMILY DIANE DIXON and ETHAN DAVID DIXON

Petitioners

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CENTENNIAL CONCRETE INCORPORATED

Employer

SUSAN DIXON

Widow

MARILYN (DIXON) FUNK

Former Spouse.

ORDER ON GUARDIAN *AD LITEM* FEES

Summary: Four guardians *ad litem* were appointed to represent the diverging interests of children and putative stepchildren of a worker whose 1996 injury caused his death in 1999. At the request of one guardian, the question of how guardians would be compensated, and at what rate, was presented to the Court prior to discovery and trial. Three guardians, and two mothers appearing individually, argued guardian fees should be paid by the insurer, State Compensation Insurance Fund, without recoupment of fees from benefits ultimately deemed payable. State Fund, and one guardian, did not take a position on the source or appropriate amount of fees.

Held: Although Montana case law requires the Workers' Compensation Court to appoint guardians *ad litem* to represent the interests of minor children in appropriate cases, neither statutory law, case law, nor Court rule addresses how guardians should be compensated in workers' compensation proceedings or at what rate. Applying general principles of equity and reasonableness, and following the unanimous recommendation of the parties who have taken a position on the matter, the Court orders State Fund to pay reasonable

guardian fees without recoupment from benefits since State Fund requested appointment of guardians and stands to benefit most from inclusion of all known possible beneficiaries in this litigation. Given the circumstances of this case and the virtual agreement of the parties, the Court does not reach the alternative arguments. Since each of the guardians is an attorney with workers' compensation expertise, the hourly rate shall be $75 per hour, which is consistent with the hourly rate set in ARM 24.29.3802 for attorneys handling workers' compensation claims on an hourly rate basis. Claims for fees from guardians will be reviewed by the Court for reasonableness.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Administrative Regulations: ARM 24.29.3802.** The $75 hourly rate set in ARM 24.29.3802 for attorneys handling workers' compensation claims on an hourly rate basis is an appropriate rate of compensation for attorneys acting as guardians *ad litem* in workers' compensation proceedings.
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> **Guardians and Conservators: Guardian *ad litem*.** Applying general principles of equity and reasonableness, and following the unanimous recommendation of the parties who have taken a position on the matter, the Court orders State Fund to pay reasonable guardian fees without recoupment from benefits since State Fund requested appointment of guardians and stands to benefit most from inclusion of all known possible beneficiaries in this litigation. Given the circumstances of this case and the virtual agreement of the parties, the Court does not reach the alternative arguments.
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> **Guardian and Conservators: Guardian *ad litem*.** The $75 hourly rate set in ARM 24.29.3802 for attorneys handling workers' compensation claims on an hourly rate basis is an appropriate rate of compensation for attorneys acting as guardians *ad litem* in workers' compensation proceedings. Claims for fees from guardians will be reviewed by the Court for reasonableness.

¶1 The matter before the Court involves the compensation of guardians *ad litem* appointed to represent the interests of minor children in workers' compensation proceedings. While the Court has appointed guardians *ad litem* in prior cases, the question of how guardians are compensated and at what rate are matters of first impression.

Factual and Procedural Background

¶2 The following facts are taken from the pleadings on file and from information provided to the Court for purposes of appointing guardians. The facts are assumed only for the purpose of resolving issues regarding appointment and compensation of guardians.

¶3 Robert Dixon (Robert), the decedent, is the biological father of Emily Diane Dixon (Emily). Emily was born July 12, 1993. Marilyn Dixon Funk (Marilyn) is Emily's mother. Robert and Marilyn were not married at the time of Emily's birth. On July 6, 1996, Robert Dixon suffered a serious head injury in the course of employment. State Compensation Insurance Fund (State Fund) accepted liability for the injury. While Robert and Marilyn were not married at the time of the injury, they married on or around July 18, 1996, approximately two weeks after the accident.

¶4 Marilyn is also the mother of three other children who are not the biological children of Robert. They are Aaron Winslow, Stephiny Winslow, and Kristin Edgell (Winslow/Edgell children). These children, or some of them, may or may not have lived with and/or received support from Robert at various times. One of the issues in this matter is whether the Winslow/Edgell children are entitled to share in death benefits under the Workers' Compensation Act.

¶5 In 1998 Robert and Marilyn divorced. Later that year, Robert married Susan Sweeney Dixon (Susan). On November 18, 1998, Ethan Daniel Dixon was born to Robert and Susan. Susan is also the mother of two other children who are not the biological children of Robert. These are Justin and Aaron Fraley (Fraley children). Issues exist as to whether Ethan and/or the Fraley children are entitled to share in death benefits.

¶6 Robert died on August 26, 1999, following an automobile accident. State Fund concedes that Robert's death was proximately caused by the 1996 work injury and that death benefits are due, however, it has refused to begin paying benefits without a determination in this Court as to the rightful beneficiaries.

¶7 The pending petition was filed on behalf of Emily and Ethan by attorney Robert J. Whelan. Mr. Whelan has a contingency fee agreement regarding this representation. Mr. Whelan has also represented Susan, Emily, and Ethan in other non-workers' compensation matters arising from Robert's death.

¶8 The State Fund's response to petition requested "that guardians, and/or guardians *ad litem* be appointed for each of the children claiming benefits, as their interests may be adverse to one another." (Response to Petition, ¶ 2.) When State Fund's response was filed, the only two children claiming benefits were Emily and Ethan. However, the State Fund was legitimately concerned that the two children had potentially adverse interests because an argument might be made under applicable statutes that Ethan was not entitled to death benefits because he had not been born at the time of the injury and yet is not a posthumous child. See, sections 39-71-116(5), (7), -721, -722, MCA, and paragraphs 20 through 22 below.

¶9 On February 16, 2001, the Court ordered appointment of attorneys Frank J. Joseph and Molly A. Maffei as guardians *ad litem* for Emily and Ethan, respectively. These

appointments followed discussions between the parties and the prior agreement of Mr. Joseph and Ms. Maffei to serve as guardians if appointed. At the time of their appointment, no issues were raised about the source and rate of compensation for guardians. While Mr. Joseph and Ms. Maffei are both attorneys with experience and expertise relevant to the issues in this case, Mr. Whelan actually remains the attorney for both children in this proceeding.

¶10 Based upon allegations made in the petition and response, the Court noted that Marilyn (Dixon) Funk and Susan Dixon may have their own personal claims for a share of death benefits. The Court thus issued summons for Susan Sweeney Dixon and Marilyn (Dixon) Funk. Both eventually appeared in the case, representing themselves.

¶11 During a pretrial conference held May 2, 2001, Susan confirmed that she does claim a personal share in death benefits. She also requested the Court to rule on whether the Fraley children are entitled to a share of death benefits. Marilyn did not attend the pretrial conference, but filed a letter in response to the petition on June 11, 2001. Her response included her own claim for death benefits personally as well as a claim on behalf of the Winslow/Edgell children.

¶12 At the May 2, 2001 pretrial conference, counsel for State Fund requested that the Court appoint guardians *ad litem*, to represent, respectively, the interests of the Fraley and Winslow/Edgell children. Given the factual and legal issues raised, the Court agreed the appointments were necessary. Based upon recommendations of counsel, the Court, by Order dated May 3, 2001, appointed attorney Charles G. Adams as guardian *ad litem* for the Fraley children and attorney C. Kathleen McBride as guardian *ad litem* for the Winslow/Edgell children. Both counsel have expertise and experience relevant to issues presented in this case. The order of appointment was based on the Court's understanding that counsel had agreed to accept the appointments.

¶13 On May 21, 2001, Ms. McBride asked for clarification of issues regarding compensation of guardians prior to her filing a response to petition on behalf of the Winslow/Edgell children. In a communication to all parties, the Court suggested that guardians be compensated by the State Fund at an hourly rate set by the Court and to be later recouped by the insurer from the benefits ultimately paid. The Court considered this proposal analogous to the practice of paying guardian and/or attorney costs from the estates of individuals under guardianship or conservatorship. See § 72-5-432, MCA ("If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate"); *In the Matter of the Guardianship of Mary Daulton*, 138 Mont. 96, 354 P.2d 1048 (1960) (dispute as to amount of attorney's fees incurred in protection of estate of individual under guardianship, but no dispute that fees came from estate.)

¶14 Because not all parties agreed to the proposal, the Court requested briefs on the issue. Written argument was received from Mr. Joseph, Ms. Maffei, Ms. McBride, Susan Dixon, and Marilyn Funk. Mr. Charles G. Adams, guardian for the Fraley children, informed the Court he would not take a position on the source of funding for guardian fees or on the appropriate rate of compensation. State Fund did not file a brief, but State Fund's counsel, Mr. Thomas Martello, informed Hearing Examiner Jay Dufrechou that State Fund would not take a position on compensation issues. Mr. Martello acknowledged he had received the written arguments of the other parties and was aware of the positions of the other parties on the issues raised.

¶15 In their written argument to the Court, the three guardians contend that compensation for guardians should be paid by the State Fund and not out of benefits. The arguments in each brief are similar and point out (1) that if fees come out of benefits, successful litigants may, in essence, be required to pay fees generated by unsuccessful litigants; (2) that State Fund is the party requesting the appointment of guardians and is the party standing to benefit from joinder of all possible claims in one proceeding; and (3) that State Fund as the insurer risks awards beyond the amount of benefits (penalty and attorneys' fees in possible subsequent cases) if it does not act reasonably. The guardians argue that under these circumstances it is equitable to assess guardian fees against State Fund rather than deduct them from the death benefits.

¶16 In her written argument to the Court, Susan expresses her strong concerns that paying guardians from benefits will diminish the benefits available. She noted that benefits to Ethan and Emily are already subject to a contingency fee agreement with Mr. Whelan. Susan argues that guardian fees should either be paid by State Fund or deducted from Mr. Whelan's contingency fee. Marilyn filed her own letter "in agreement to Susan Dixon's letter," noting that all attorneys should either share in the contingency fee or be paid by State Fund.

Discussion

¶17 Under *Hock v. Lienco Cedar Products*, 194 Mont. 131, 137, 634 P.2d 1174, 1177-1178 (1981), the Workers' Compensation Court not only has the authority to appoint a guardian *ad litem* in appropriate cases, but must exercise that authority where required by the interests of a minor child. *Hock* suggests appointment of a guardian *ad litem* is necessary where the minor's interests potentially diverge from the interests of other parties.

¶18 In the present case, no party disagrees with the appointment of guardians *ad litem*. I have already found appointment necessary in prior orders, but I will briefly note the reasons guardians *ad litem* are needed.

¶19 Under applicable statutes, serious questions exist as to which of the children are entitled to share in death benefits. The complications arise largely because (1) Ethan,

Robert's biological child, was born *after* the injury but not posthumously; and (2) Robert may have supported the Winslow/Edgell and/or the Fraley children at various times.

¶20 Section 39-71-721(1)(a), MCA (1995), provides that "[i]f an injured employee dies and the injury was the proximate cause of the death, the beneficiary of the deceased is entitled to the same compensation as though the death occurred immediately following the injury." Section 39-71-722, MCA (1995), requires that "[t]he question **as to who constitutes a beneficiary shall be determined as of the date of the happening of the accident to the employee, whether death shall immediately result therefrom or not."** (Emphasis added.)

¶21 "Beneficiary" is defined in section 39-71-116(5), MCA (1995). The first two subsections are relevant to this matter. They provide:

> "Beneficiary" means:
>
> > (a) a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury;
> >
> > (b) an unmarried child under 18 years of age;
>
> . . . .

¶22 Finally, section 39-71-116(7), MCA (1995), contains the statutory explanation of "child":

> "Child" includes a posthumous child, a dependent stepchild, and a child legally adopted prior to the injury.

¶23 The appointment of four guardians *ad litem* is necessary because the interests of the various children and their mothers conflict. Neither their mothers, nor a single attorney, can adequately assess the children's interests in light of the conflict. For example, while common sense and traditional probate principles suggest that *both* of Robert's biological children should share in death benefits, section 39-71-722, MCA (1995) directs the Court to determine beneficiaries as of the date of the accident, when Ethan was not yet born. While the reference to "posthumous child" in section 39-71-116(7), MCA (1995) suggests an intention to include later-born children, Ethan was actually born before his father's death and is not a posthumous child in the ordinary sense. More complicated yet is the situation of the Winslow/Edgell and Fraley children. Although the relevant facts have not yet been developed, these two groups of children appear to have an argument that they were dependent stepchildren at a relevant time and are thus statutory beneficiaries.

¶24 While the need for guardians is clear, the question of compensation is more difficult. The issue of compensation was not addressed in *Hock*. *Hock* did reference Rule 17(c), M.R.Civ.P., as authority cited for appointment of a guardian *ad litem*, but that rule does not address compensation of guardians. Although not cited in *Hock*, section 25-5-301, MCA,

provides statutory authority for appointment of a guardian *ad litem* in a civil case. Even assuming that statute was appropriately applied in workers' compensation cases, the statute makes no reference to compensation of the appointed guardian.

¶25 In other contexts, Montana statutes or case law speak to the source of compensation for guardians *ad litem*. In the context of marriage dissolution, child custody, and child support, section 40-4-205, MCA, authorizes the Court to appoint a guardian *ad litem* to represent the child's interest. Subsection (4) of the statute provides:

> The court shall enter an order for costs and fees in favor of the child's guardian ad litem. The order must be made against either or both parents, except that if the responsible party is indigent, costs must be waived.

¶26 In child abuse and neglect cases, section 41-3-303, MCA, mandates the appointment of a guardian *ad litem* to represent the interests of the child. The statute provides, "When necessary, the guardian ad litem may serve at public expense." After some courts imposed guardian fees and costs upon the parents of the allegedly neglected or abused child, the Montana Supreme Court ruled that such assessment was not appropriate in the absence of specific statutory authorization, leaving the cost to the public. *In re Inquiry Into A.W., D.G., & M.G., Jr.* 1999 MT 42, 293 Mont. 358, 974 P.2d 1350.

¶27 In the workers' compensation context, case law requires the appointment of guardians in appropriate cases, but neither case law nor court precedent guide the determination of who pays guardian fees. There is also no public fund the Workers' Compensation Court can tap for the fees. In that vacuum, the determination must fall upon general principles of equity and reasonableness. See, e.g., *Kelly v. Kelly*, 89 Mont. 229, 297 P.2d 470, 473 (1931) (in absence of application of specific statutes, reimbursement of de facto guardian would be guided by "equitable principles.")

¶28 While my initial proposal to the parties involved recouping fees from benefits, I am persuaded recoupment is not the most equitable result in this particular case. All parties and representatives taking a position on the matter agree that fees should be paid by the State Fund and not out of benefits. The State Fund has not taken a position. More importantly, under the unique facts of this case, the arguments against payment of fees out of benefits makes sense. State Fund does not dispute that death benefits are payable, but wants a Court order prior to disbursement of benefits. While its position is reasonable, it is also clear that State Fund will benefit most from an order resolving claims of all known possible beneficiaries. If it had instead begun to pay benefits to some parties, and the Court later determined it should have been paying different or additional beneficiaries, the State Fund would be subject to duplicative retroactive payments to the proper beneficiaries and might have difficulty recouping overpayment to non-beneficiaries or overpayment to other beneficiaries. Finally, State Fund requested appointment of guardians *ad litem* for both the biological children and the putative stepchildren.

¶29 Both Susan and Marilyn, while agreeing State Fund is an appropriate source of guardian fees, have also suggested that all counsel could be paid from the contingency fee to which Mr. Whelan will be entitled once this case resolves. Consideration of that alternative proposal is unnecessary in light of my conclusion that State Fund should pay the guardians.

Guardian Fee Rate

¶30 The final question is the appropriate rate of compensation to guardians. The three guardians submitting written argument have made various points and suggestions. Mr. Joseph, Emily's guardian *ad litem*, notes:

> In Silver Bow County, Guardian ad Litems appointed by the Court in parental right termination cases are compensated at the rate of $40.00 per hour, plus expenses. Also, in criminal cases where special counsel or Guardians are appointed, Silver Bow County pays attorneys $60.00 per hour, which is later reimbursed by the State. In two civil cases where I agreed to serve as Guardian ad Litem, I was compensated at my normal hourly rate of $100.00 per hour.

(Guardian Ad Litem's Position Statement to Court at 3.) Mr. Joseph suggests $100.00 per hour is appropriate in this case. Ms. Maffei, Ethan's guardian *ad litem*, agrees that "an appropriate hour rate for a guardian ad litem in this type matter is $100.00 per hour." Ms. McBride, who has been appointed guardian for the Winslow/Edgell children, notes that:

> While our District Court compensates attorneys acting as guardians *ad litem* in foster care and child removal situations at the hourly rate of $40 per hour, and many of us accept those appointments for our local Judges, this case has significant legal implications. My willingness to accept this case was on the assumption that the hourly rate would to [sic] the same or close to my customary hourly rate of $140 for family law work.

(Guardian Ad Litem's Statement of Position at 3.) Ms. McBride indicates she would be "willing to accept appointment with compensation at the rate of $120 to $140 per hour." (*Id.*)

¶31 Although not cited by any party, the most appropriate point of reference concerning rates is the hourly rate set by administrative rule for representation of claimants in workers' compensation matters. ARM 24.29.3802 requires attorneys representing claimants in workers' compensation matters to inform the Department of Labor and Industry of the terms of their fee agreements. After recognizing and setting parameters for the contingency fee agreements customary in the field, the rule also provides: "The fee schedule set forth in subsection (3) does not preclude the use of other attorney fee arrangements, such as the use of a fee system based on time at a reasonable hourly rate not exceeding $75.00 per hour. . . . "

¶32 The Court deems the $75 hourly rate referenced in ARM 24.29.3802 an appropriate upper limit for compensating guardians *ad litem* in workers' compensation cases where the guardians are attorneys and provide legal representation of their ward's interest. The Court is mindful that many Montana attorneys ordinarily charge higher rates, but is hopeful that some attorneys will continue to afford this Court, and minors required to appear in this Court, the courtesy shown to District Courts, and to minors appearing in those courts, by the occasional acceptance of appointments at reduced rates of compensation.

¶33 As in all other matters involving assessment of fees and costs in the Workers' Compensation Court, claims for compensation submitted by guardians *ad litem* will be subject to review by this Court for the reasonableness of the hours charged for the work conducted.

¶34 If any guardian *ad litem* in this matter wishes to withdraw in light of this Order, a request for withdrawal should be submitted to the Court within 7 days of the date of this Order.

¶35 If Mr. Adams and/or Ms. McBride choose to proceed with their respective roles as guardian *ad litems* for the Fraley and Winslow/Edgell children, their response to petition on behalf of those children should be filed no later than 14 days from the date of this Order.

ORDER

¶36 State Fund shall pay the fees of the guardians *ad litem* appointed in this case. The cost shall **not** be recouped from benefits ultimately deemed payable.

¶37 The hourly rate of compensation for guardians *ad litem* in this matter is $75 per hour.

¶38 Claims for hours worked will be subject to review for reasonableness by this Court.

¶39 Response to petition on behalf of the Fraley and Winslow/Edgell children shall be filed no later than 14 days from the date of this Order by any guardian continuing in this matter.

DATED in Helena, Montana, this 26th day of July, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert J. Whelan
Mr. Thomas E. Martello
Ms. Susan Dixon
Ms. Marilyn (Dixon) Funk
Mr. Frank. J. Joseph
Ms. Mollie A. Maffei

Ms. C. Kathleen McBride
Mr. Charles G. Adams