

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 15

WCC No. 2002-0527

CONOCO, INCORPORATED

Petitioner

vs.

WILLIAMS INSULATION COMPANY, INCORPORATED

Respondent.

DECISION AND SUMMARY JUDGMENT

Summary: Claimant, Tom Fugere (Fugere), was injured at Conoco's Billings, Montana refinery while working for Williams Insulation Company ("WIC" or "Williams"), a Conoco subcontractor hired to install pipe insulation at the refinery. At the time of the accident, Williams had Wyoming workers' compensation coverage but no Montana workers' compensation coverage. Fugere initially sought benefits in Wyoming but his claim was denied because it was untimely and because he was working in Montana and therefore, according to Wyoming authorities, not covered under the Wyoming policy. He filed a claim in Montana, which was forwarded to the Uninsured Employers' Fund (UEF) since Williams was uninsured in Montana. The UEF then made demand on Conoco that it pay benefits pursuant to section 39-71-405, MCA. Conoco did and now seeks indemnification from Williams.

Held: Assuming Conoco is a Plan I self-insured, it is entitled to indemnification from WIC pursuant to section 39-71-405, MCA (1999). WIC failed to provide Montana workers' compensation insurance as required by section 39-71-402(5), MCA, therefore, Conoco was required to step in and pay benefits

Topics:

Employers: Insurance. At the time of the claimant's injury on February 23, 2000, section 39-71-402(5), MCA, required any contractor engaged in insulating pipes to provide Montana workers' compensation insurance for its employees working in Montana.

Employers: Subcontractors. Pursuant to section 39-71-405, MCA (1999), where a subcontractor fails to provide required Montana workers' compensation coverage for its employees, the contractor hiring the subcontractor, or its insurer, is liable for benefits

payable to an employee of the subcontractor who is injured in the course and scope of his employment on the project for which the subcontractor was hired.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-405, MCA (1999). Pursuant to section 39-71-405, MCA (1999), where a subcontractor fails to provide required Montana workers' compensation coverage for its employers, the contractor hiring the subcontractor, or its insurer, is liable for benefits payable to an employee of the subcontractor who is injured in the course and scope of his employment on the project for which the subcontractor was hired.

Indemnification: Contractor-Subcontractor. A contractor or its insurer required to pay benefits under section 39-71-405, MCA (1999), because the subcontractor is uninsured is entitled to indemnification from the subcontractor for the benefits paid. § 39-71-405, MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-405, MCA (1999). A contractor or its insurer required to pay benefits under section 39-71-405, MCA (1999), because the subcontractor is uninsured is entitled to indemnification from the subcontractor for the benefits paid.

Procedure: Issues. The Court will not consider issues outside the scope of the pleadings, including affirmative defenses not alleged in the response to the petition.

Procedure: Issues. The Court will not consider constitutional arguments which merely cite a constitutional provision and no other legal authority.

Attorneys: Conduct and Tactics. Attorneys have an obligation to fully inform the Court regarding essential facts and must avoid providing the Court with misleading half-truths.

¶1 This is a follow-on proceeding to *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, WCC No. 2001-0473. In that prior proceeding, I affirmed a \$94,484.86 penalty imposed by the Montana Department of Labor and Industry (Department) for Williams' failure to maintain Montana workers' compensation insurance. (2002 MTWCC 33.) The present proceeding was commenced by Conoco, Incorporated (Conoco), for a declaratory judgment that it is entitled to indemnification for workers' compensation benefits it has paid Fugere pursuant to section 39-71-402(5), MCA. It was Mr. Fugere's injury and resulting workers' compensation claim that triggered the penalty proceeding referred to above.

¶2 Conoco moves for summary judgment. It argues that the admitted facts in the petition, along with the prior decision in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, establishes Conoco's right to indemnification as a matter of law.

¶3 Williams has filed a brief opposing summary judgment, however, that brief is grossly deficient. First, Williams sets out its own statement of uncontested facts but does not

supply a single citation to support those facts. Second, it does not address either Conoco's collateral estoppel argument or its contractual indemnification argument other than to urge that the facts decided in the prior proceeding are on appeal. I am left to assume that it does not dispute Conoco's legal and factual analysis of either issue. Third, it argues that section 39-39-402, MCA, is unconstitutional under the Privileges and Immunity Clause and the Full Faith and Credit Clause of the United States Constitution but does not cite even a single case to support application of those clauses to the statute in question, this despite the Court's admonishment of counsel in its prior decision for a similar failure to cite legal authority. Fourth, it argues that in the prior proceeding it was denied an opportunity for hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution. It provided no case authority in the first case, and provides no case authority in this one,(1) despite admonishment by the Court in the prior proceeding for its failure. The quality of advocacy in Williams' brief falls far short of what the Court expects of counsel practicing before this Court.

¶14 Compounding the foregoing deficiencies, Williams repeats its contention, made in the first case, that Mr. Fugere's Wyoming claim with respect to his accident "was rejected because he filed it late." The contention is fact number 3 at page 2 of its brief

Mr. Fugere submitted his claim to Wyoming workers' compensation. It was rejected because he filed it late. (For argument purposes, if Mr. Fugere had been working for an insurer and filed his claim late we doubt seriously that Conoco would have rushed to pick up the claim.) [Parenthetical material in original; bolding added.]

A similar contention in the prior case brought the Court's rebuke. I said:

Initially, I note Williams assertion that the worker [Fugere] whose claim brought on this proceeding was turned down for Wyoming benefits because he "did not timely notify the Workers' Compensation division in Wyoming of this [his] claim." (Plaintiff's Initial Brief at 3.) Williams goes on to argue, "What has occurred here is that an employee is searching for some venue to achieve some remedy when his remedy is set forth in Wyoming law that his claim must be submitted to the Wyoming Workers' Compensation division." (Id. at 3-4.) These statements misrepresent the facts and counsel for Williams is admonished for making them. The hearing officer's decision (Findings of Fact, Conclusions of Law and Order at 3, ¶ 8), states that Wyoming rejected the claim not only on the basis of untimeliness, but also because "the employer had hired Fugere [the claimant] to work primarily in a state other than Wyoming and therefore Wyoming had no jurisdiction or coverage of the alleged injury." Not only does Williams fail to cite any evidence contrary to the finding, the finding is supported by an April 28, 2000 letter of the Department of Employment, Division of Workers' Safety and Compensation which is part of the record below. The second reason given in that letter for rejecting the claim was, "The employee was hired to work primarily in another state and therefore is not under Wyoming jurisdiction

pursuant to Wyoming Statute 27-14-301." (Grady Prince's Final Determination letter of April 28, 2000, to Mr. Fugere.)

(2002 MTWCC 33, ¶ 6.)

¶5 To renew almost the same contention here blatantly disregards the Court's prior admonishment. Counsel is warned that future instances of this sort will trigger proceedings for sanctions pursuant to 39-71-2914, MCA, which provides in relevant part:

(3) The signature of an attorney or party constitutes a certificate by him that:

(a) he has read the petition, pleading, motion, or other paper;

(b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;

....

(4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

¶6 But this is not the end of it. In its Response to Declaratory Ruling, which was drafted and signed by its counsel, Williams admits that Fugere was injured while working for WIC then argues in its brief that Fugere was injured on the job. The Petition for Declaratory Ruling, ¶ I. A of its statement of "Uncontested Facts, alleges:

On or about February 23, 2000, Thomas Fugere ("Fugere") was involved in an accident and sustained injuries when he was lifting scaffolding while performing pipe insulation work at a Conoco facility in Billings, Yellowstone County, Montana. At the time of his injury, Fugere was an employee of WIC. WIC was performing the pipe insulation work pursuant to a contract with Conoco.

In its Response to Declaratory Ruling at page 1, WIC responds: "Plaintiff [sic] admits the allegation contained in Paragraph A under Uncontested Facts." (Underlining and bolding added.) Despite that admission, in "Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment [sic, sic, sic; underlining added], Williams, through its counsel, denies that Fugere suffered a work-related issue:

Respondent does not believe that Mr. Fugere sustained a work-related injury. Specifically and in response to that Respondent has submitted Responses to Discovery Requests from Petitioner and in answer to interrogatory number three states the following:

"Respondent denies that Mr. Fugere was injured on the job in February of 2000. He had reported that he was injured in a baseball game approximately one week prior to his alleged comp claim. He was also in a fight with another worker after he claimed to have been injured. His job was carrying 30 pound boxes of insulation. He was a laborer."

(Plaintiff's Brief in Opposition To Defendant's Motion for Summary Judgment at 3.) The Court will not consider argument contrary to its admissions in its Response.

¶7 Also, WIC's counsel either cannot distinguish between plaintiffs and defendants, petitioners and respondents, or he failed to devote sufficient time to proof reading his briefs. I will assume the latter.

¶8 And, that is still not the end. In its brief opposing summary judgment, WIC has raised several constitutional challenges to both section 39-71-402, MCA, and the procedure in the prior proceeding involving the UEF. Not one of those challenges is set out in WIC's Response to the Petition for Declaratory Ruling.

FACTS

¶9 The following facts are set forth in the Petition for Declaratory Ruling and admitted in the Response to Petition for Declaratory Ruling or from uncontested exhibits to the motion for summary judgment, or as matters of judicial notice of this Court's prior decision in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33.

¶9a On or about February 23, 2000, Thomas Fugere ("Fugere") was involved in an accident and sustained injuries when he was lifting scaffolding while performing pipe insulation work at a Conoco facility in Billings, Yellowstone County, Montana. At the time of his injury, Fugere was an employee of WIC. WIC was performing the pipe insulation work pursuant to a contract with Conoco. Petition for Declaratory Ruling, ¶ I(A); Response to Declaratory Ruling, p. 1.

¶9b Fugere had been residing in Montana but had just moved to Wyoming prior to his employment with WIC.(2) Fugere was hired by WIC on February 20, 2000 and carried out his entire employment duties for WIC in Billings, Montana, until he was injured on February 23, 2000. WIC did not have workers' compensation coverage in Montana. (Petition for Declaratory Ruling, ¶ I (B.); Response to Declaratory Ruling at 1.)

¶9c The Uninsured Employers' Fund invoked § 39-71-405, MCA and presented Fugere's claim for benefits to Conoco, which has paid benefits to Fugere. (See Petition for Declaratory Ruling, ¶ I(C); Response to Declaratory Ruling at 1-2.(3))

¶9d An agreement exists between Conoco and WIC whereby WIC agrees to indemnify Conoco for the workers' compensation benefits Conoco has paid to Fugere, should it be

determined that Fugere is a WIC employee within the State of Montana. (See Petition for Declaratory Ruling, ¶ I(E); Response to Declaratory Ruling at 2.)

¶9e The insulation of pipes and boilers is one of the groups of contractors listed in Major Group 17 of the 1987 Standard Industrial Classification Manual. (Ex. 2 to Petitioner's Motion for Summary Judgment, With Supporting Brief, discussed at p. 6 of the Brief.) In its brief opposing the motion for summary judgment, WIC does not dispute the fact that it is a contractor engaged in "insulation of pipes and boilers" and is therefore a contractor listed in Group 17 of the 1987 Manual.(4)

¶10 Conoco also seeks to collaterally estop claimant with respect to facts, as well as rulings of law, made in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33.

Discussion

¶11 The claimant's injury occurred on February 23, 2000, therefore this case is governed by the law in effect on that date. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶12 It is undisputed that WIC employed Fugere in pipe insulation work at Conoco's Billings, Montana refinery under a contract it had with Conoco. It is also undisputed that Fugere was injured on February 23, 2000, while working on that project and that at the time of his injury WIC did not have Montana workers' compensation insurance coverage. Fugere sought Montana workers' compensation benefits. Since WIC was uninsured, his claim was sent to the UEF, which in turn tendered the claim to Conoco pursuant to section 39-71-405, MCA (1999). These facts are established without reference to the prior proceeding between WIC and the UEF.

¶13 Section 39-71-405, MCA (1999), requires a general contractor or its insurer to pay workers' compensation benefits to injured workers employed by an uninsured subcontractor. The section provides:

39-71-405. Liability of employer who contracts work out. (1) An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Worker's Compensation Act. Any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses from the contractor primarily liable therein. [Emphasis added.]

Conoco employed WIC to insulate pipes at its Billings refinery, therefore if WIC did not "properly comply with the coverage requirements of the [Montana] Workers' Compensation Act," Conoco was liable for workers' compensation benefits due Fugere.(5)

¶14 WIC has admitted that claimant suffered a work-related injury while working for it in Billings at Conoco's Billings refinery. It has admitted it did not have Montana workers' compensation coverage.

¶15 Section 39-71-402, MCA (1999), provides in relevant part:

39-71-402. Extraterritorial application and reciprocity -- exception.

....

(2) Except as provided in subsection (5), if a worker from another state and the worker's employer from another state are temporarily engaged in work within this state, this chapter does not apply to them.

....

(5) Employers from another state that are engaged in the construction industry, as defined in 39-71-116, and that employ workers from another state shall obtain coverage for those workers under the provisions of this chapter.

Under subsection (5), if WIC was "engaged in the construction industry, as defined in 39-71-116" at the time of Fugere's injury, then it was required to have Montana workers' compensation coverage.

¶16 Contractors subject to subparagraph (5) of section 39-71-402, MCA, are defined in section 39-71-116, MCA (1999), specifically in subsection (9). While subsection (9) was amended by the 1999 legislature, that amendment was expressly inapplicable until July 1, 2001. The version in effect at the time of claimant's injury provides:

(9) "Construction industry" means the major group of general contractors and operative builders, heavy construction (other than building construction) contractors, and special trade contractors, listed in major groups 15 through 17 in the 1987 Standard Industrial Classification Manual. The term does not include office workers, design professionals, salespersons, estimators, or any other related employment that is not directly involved on a regular basis in the provision of physical labor at a construction or renovation site. [Emphasis added.]

As set forth in the uncontested facts above, contractors engaged in the "insulation of pipes" are listed in major Group 17 of the 1987 Manual and are therefore contractors within the meaning of section 39-71-116(9), MCA (1997), and section 39-71-402(5), MCA. Thus, the Montana Workers' Compensation Act required WIC to provide Montana workers' compensation insurance coverage for its workers at the Conoco refinery in Billings,

including coverage for claimant. Having failed to do so, Conoco was and is liable for claimant's injury under section 39-71-405, MCA, but is also entitled to indemnification from WIC.

¶17 Thus, even without resort to this Court's prior decision in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33, the uncontroverted facts admitted by WIC establish Conoco's right to indemnification under section 39-71-405, MCA.

¶18 The Court is also bound by the determination by the Department which was the subject of the appeal in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33. WIC does not argue otherwise, it simply says the prior proceeding is on appeal to the Supreme Court.

¶19 Assuming the prior decision is not reversed on appeal, the Department decision in the prior proceeding collaterally estops WIC from relitigating facts and law determined in that prior proceeding. The doctrine of collateral estoppel is a companion doctrine of res judicata. The doctrine of res judicata precludes relitigation of the same claim or cause of action; the doctrine of collateral estoppel bars relitigation of an issue or matter which was necessarily determined in a prior action. The former is characterized as "claim preclusion", the latter as "issue preclusion":

[R]es judicata is a final judgment which, when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand. *Fiscus*, 591 P.2d at 197 (quoting *Western Montana Prod. Credit Ass'n v. Hydroponics, Inc.* (1966), 147 Mont. 157, 161, 410 P.2d 937, 939). See also *Hollister v. Forsythe* (1996), 277 Mont. 23, 27, 918 P.2d 665, 667. We defined collateral estoppel as a final judgment which bars the parties, or those in privity with them, from relitigating matters which were previously necessarily litigated and determined, even if the claim or demand in the subsequent action is different. *Fiscus*, 591 P.2d at 197 (quoting *Western Mont. Prod. Credit Ass'n*, 410 P.2d at 939). See also *Estate of Eide v. Tabbert* (1995), 272 Mont. 180, 183-84, 900 P.2d 292, 295. In other words, res judicata is "an absolute bar to a subsequent action," while collateral estoppel "prevents the parties from relitigating only those matters that were determined." *Fiscus*, 591 P.2d at 197. Res judicata, therefore, also properly is referred to as "claim preclusion," while collateral estoppel also properly is referred to as "issue preclusion." *Brault v. Smith* (1984), 209 Mont. 21, 26, 679 P.2d 236, 238.

Scott v. Scott, 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997).

¶20 The doctrine of res judicata has specifically been held to apply to administrative proceedings which are judicial in character. *Nasi v. State Dept. of Highways*, 231 Mont. 395, 397-98, 753 P.2d 327, 329 (1988) (citing and quoting from *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)). Since the rationale for the doctrine

is identical to the rationale for res judicata, there is no reason for not extending collateral estoppel to administrative proceedings which are judicial in character. The Department proceeding at issue in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33, was a contested case proceeding, thus it was judicial in character.

¶21 The Montana Supreme Court has set forth a three-part test for determining whether collateral estoppel bars an action:

- (1) the issue presented in a later action has been decided in a prior adjudication;
- (2) a final judgment in the action was issued; and
- (3) the party against whom collateral estoppel is asserted was a party to the previous litigation.

Robinson v. First Wyoming Bank, N.A., 274 Mont. 307, 318-19, 909 P.2d 689 (1995) (holding that the Robinsons were estopped from claiming there was no consideration for the mortgage because: (1) a Wyoming consent judgment recognized the mortgage was valid and it secured payment of the judgment; (2) there was a final judgment which held that the mortgage was valid; and (3) the Robinsons were parties to the Wyoming action and judgment); *HKM Assocs. V. Northwest Pipe Fittings*, 272 Mont. 187, 900 P.2d 302, 305 (1995). In the present case, (1) the issue of WIC's obligation to provide workers' compensation coverage for Montana employees at the Conoco refinery was decided in the prior case; (2) a final judgment was entered by the Department and affirmed by this Court upon WIC's request for judicial review; and (3) WIC was a party to the Department proceeding. Thus, all three criteria are satisfied.

¶22 Specifically, with regard to WIC's obligation to provide Montana workers' compensation insurance, the Department's hearing officer, found:

1. Williams Insulation, Inc., is a Wyoming corporation, incorporated in 1989, with its principal business office in Wyoming. It has been qualified to do business in Montana since 1994. The company provides contractor services to customers in Wyoming, Montana, North Dakota, Arizona, Minnesota and Colorado. When it provides services in Montana, it is engaged in the construction industry, as defined in § 39-71-116.

Findings of Fact, Conclusions of Law and Order, Finding of Fact Number 1, on file in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, WCC No. 2001-0473. In his second conclusion of law, the hearing officer found that WIC was "an uninsured employer [in Montana] from June 26, 1997 to June 26, 2000, in violation of § 39-71-401." Id.

¶23 Conoco also seeks indemnification under its contract with WIC. In its brief opposing summary judgment, WIC does not dispute that its contract with Conoco requires it to indemnify Conoco for workers' compensation benefits, rather it argues:

With regard to uncontroverted fact number three [the contractual indemnification provision], while there may be an indemnification agreement between Petitioner and Respondent it is only for legitimately paid workers' compensation benefits and Respondent has never agreed that Mr. Fugere was entitled to any benefits.

(Plaintiff's Brief in Opposition to Defendant' Motion for Summary Judgment at 3.) Since Conoco was required under section 39-71-405, MCA, to pay benefits for Fugere's industrial injury, its payment of benefits was "legitimate" and it is entitled to indemnification under its contract with WIC.

¶24 In its brief opposing summary judgment, WIC also attacks both the constitutionality of section 39-71-402, MCA, and the Department's procedure in the prior penalty proceeding, *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33.

¶25 As I noted earlier, in its response to the petition, WIC failed to aver that any statute or proceeding violated its unconstitutional rights. Its failure to raise constitutional issues in its response is fatal and precludes my consideration of the issues. Rule 24.5.302 requires that a response to a petition set out "a short, plain statement of the respondent's contentions." This rule is a concise statement of Rule 8 of the Montana Rules of Civil Procedure, which provides:

RULE 8. GENERAL RULES OF PLEADING

....

(b) Defenses--Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of

consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. [Emphasis added.]

The unconstitutionality of a statute or proceeding is a "matter constituting an avoidance or affirmative defense," thus it must be pled affirmatively in the response. Indeed, in any proceeding challenging the constitutionality of a statute, the Montana Rules of Civil Procedure require the party raising the challenge to give notice of the challenge both to the Montana Attorney General and the court. Rule 24(d), Mont.R.Civ.P., requires that

the party raising the constitutionality of the act shall notify the Montana attorney general and the court of the constitutional issue. This notice shall be in writing, shall specify the section of the code or chapter of the session law to be construed and shall be given contemporaneously with the filing of the pleading or other document in which the constitutional issue is raised. [Emphasis added.]

The constitutional issues raised by WIC in its brief opposing summary judgment were not properly raised.

¶26 Even if the issues were properly raised in WIC's response, three of the four challenges have not been properly briefed and I would still not consider them. As noted earlier in this decision, WIC has cited no case law in support of its assertions that section 39-71-402, MCA, violates the Privileges and Immunities Clause and the Full Faith and Credit Clause of the United States Constitution, or that it was denied due process of law in the penalty proceeding which was the subject of the prior decision in *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33. Moreover, the process afforded in the prior proceeding is immaterial to the decision in the present case. The uncontroverted material facts in the present case demonstrate that Conoco is entitled to indemnification as a matter of law.

¶27 With respect to WIC's Equal Protection challenge to section 39-71- 402, MCA, WIC contends that "not only is Montana treating a citizen of one State different from a citizen of the State of Montana but it is also treating a citizen of another State in a different fashion of yet different kinds of citizens (or businesses) of other States," citing decisions in: *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Toomer v. Witsell*, 334 U.S. 385 (1948); and *Hicklin v. Orbeck*, 437 U.S. 518 (1978), as supporting its contention. (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 5-6, bold in original.)

¶28 Without even reading the decisions cited, the argument, on its face, is untenable. Section 39-71-402, MCA, does not distinguish between residents (or citizens) of different

states: Fugere's and WIC's residency make no difference under the section. The section applies to employees and employers who are residents of Montana, Wyoming, or, for that matter, Bulgaria. The section also does not discriminate between construction contractors who reside in Montana or elsewhere: all are required to have Montana workers' compensation coverage while working in Montana.

¶29 Moreover, a review of the cases cited by WIC shows that they do not apply to the statute challenged in the present case. *Supreme Court of New Hampshire v. Piper* involved a provision limiting admission of lawyers to the New Hampshire bar to New Hampshire residents. WIC does not explain how that ruling applies to the present case and I have been unable to conjure up any possible application. *Toomer v. Witsell* involved state statutes differentiating between residents and non-residents with respect to fishing in coastal waters. Montana has no coastal waters; even if it did section 39-71-402, MCA, does not discriminate between residents and non-residents. *Hicklin v. Orbeck* involved an Alaska law which provided a hiring preference to Alaska residents. Section 39-71- 402, MCA, contains no preference similar to that considered in that case.

¶30 Assuming Conoco is a Plan I self-insured, it is entitled to reimbursement for reasonable and appropriate benefits it has paid to claimant on account of his February 23, 2000 injury. Conoco has not asked the Court to determine how much is due it from WIC. Thus, any disputes as to the reasonableness or appropriateness of specific benefits is beyond the scope of the present proceedings.

JUDGMENT

¶31 Conoco shall provide WIC and the Court with verification it is a Plan I insurer. Within ten days after furnishing that verification, WIC shall notify the Court in writing whether it contests the verification. If it does, then an evidentiary hearing shall be scheduled.

¶32 If satisfactory verification is furnished by Conoco, then it is entitled to indemnification from WIC for reasonable and appropriate compensation and medical benefits it has paid to Thomas Fugere on account of an industrial injury he suffered on February 23, 2000, while working at Conoco's refinery in Billings, Montana.

¶33 The Court has not been asked to make and makes no determination as to the reasonableness, appropriateness, or amount of benefits paid out by Conoco to which it is entitled to indemnification. Therefore, those matters are not determined.

¶34 Certification of this Judgment is withheld pending verification of Conoco's status as a Plan I self-insured.

¶35 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Summary Judgment.

DATED in Helena, Montana, this 5th day of March, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas J. Harrington
Mr. John C. Doubek
Submitted: September 27, 2002

1. Moreover, the contention has no basis for fact. Williams was afforded an opportunity for hearing, it simply failed to take advantage of it. As I noted in my prior decision:

¶2 Williams requested a contested case hearing before the Department. Rather than proceeding with an actual hearing, Williams and the Department agreed to submit the case to a Department hearing officer upon their briefs and documents on file with the Department. On November 21, 2001, the hearing officer entered his decision assessing the \$94,484.86 penalty.

(Williams Insulation Company, Incorporated v. Uninsured Employers' Fund, 2002 MTWCC 33, ¶ 2.)

2. The petition, paragraph I. B. alleges that claimant was a Montana resident who had recently moved to Wyoming. The response does not dispute the facts alleged in paragraph I. B. but alleges affirmatively that the claimant "represented" to WIC that he was a Wyoming resident. (Response to Petition for Declaratory Ruling at 1.) Whether Fugere was a Montana or Wyoming resident is immaterial to the decision in the case, therefore the affirmative allegation can be assumed to be true for purposes of the motion for summary judgment.

WIC also affirmatively alleges in its response to paragraph I. B. that it "maintained insurance on Mr. Fugere through the Wyoming Workers' Compensation Division." I assume that allegation to be true for the purposes of the motion for summary judgment, however, the fact that WIC carried Wyoming insurance is immaterial under the Montana statute applicable in this case. Moreover, one of the reasons for Wyoming denying compensation for Fugere's claim was the fact that Fugere "was hired to work primarily in another state and therefore is not under Wyoming jurisdiction pursuant to Wyoming Statute 27-14-301." *Williams Insulation Company, Incorporated v. Uninsured Employers' Fund*, 2002 MTWCC 33, ¶ 6.

3. In its response to paragraph I. C. of the Petition for Declaratory Ruling, WIC says only, "With respect to Paragraph I. C, Respondent does not know why the Uninsured Employers' Fund did what it did." (Response to Petition for Declaratory Ruling at 2-3.) That statement does not amount to denial of the allegation, indeed it implicitly admits it.

4. Pipe insulators are in Group 17 of the 1987 Standard Industrial Classification Manual. The Court confirmed the listing at the official WEB site of the United States Occupational

Safety and Health Administration, which has the 1987 Manual on-line. The search results are in the file.

5. Presumably, Conoco was self-insured under Plan 1 since it has paid benefits to Fugere. However, before entering final judgment, the Court will require confirmation of that fact