IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 1

WCC No. 2001-0409

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner/Insurer for

RIMROCK STAGES, INCORPORATED

Employer

and

BRENDA J. HALLING, a/k/a Brenda Oliver,

alleged surviving spouse of decedent/claimant

Steven R. Oliver, and mother of decedent/claimant's

natural child, SIOBHAN OLIVER, a minor

DEBORAH KLEIN OLIVER, alleged surviving spouse

of decedent/claimant and mother of decedent/claimant's

natural child STEVEN RICK OLIVER, JR., a minor

and

STEVEN RICK OLIVER, JR. a minor

Respondents.

ORDER ON SOURCE OF GUARDIAN *AD LITEM* FEES

Summary: Following appointment of a guardian *ad litem* to represent the interests of a minor child in a declaratory judgment proceeding filed by the insurer, the parties disputed the source of compensation for the guardian *ad litem*. The insurer argued the Workers' Compensation Court does not have authority to require it to compensate a guardian *ad litem* where section 39-71-2905, MCA (1995), limits the penalties and assessments that may be assessed against an insurer and does not mention guardian *ad litem* fees. The insurer also argued the Court was in essence requiring it to pay attorneys fees, but without a finding of unreasonable conduct required by sections 39-71-611 and -612, MCA (1999). Respondents argued that guardian fees are appropriately considered a cost of litigation,

appropriately borne by the insurer where it filed the action for declaratory judgment and has withheld approximately one-third of benefits admittedly payable to someone.

Held: In the absence of guidance in Montana law regarding compensation of a guardian *ad litem* in the Workers' Compensation Court, that determination must fall on general principles of equity and reasonableness. The limitation on penalties and assessments stated in section 39-71-2905, MCA (1999), is inapplicable in the context of guardian costs. Compensation of a guardian is also not within the purview of the attorney's fees provisions of sections 39-71-611 and -612, MCA (1999). Section 39-71-612, MCA (1999), does require the insurer to pay reasonable costs as established by the Court if there is a dispute over the amount of benefits due. While the insurer has evidently paid benefits on behalf of the minor, it has apparently not paid all benefits due beneficiaries and has filed a declaratory judgment action putting the amount of the minor's benefits at issue. It is within the equitable power of the Court and the costs provision of section 39-71-612, MCA (1999), to treat guardian fees as a cost to be assessed against the insurer. In this context of this case, where the insurer commenced the litigation and stands to benefit the most from an order governing all beneficiaries, guardian *ad litem* fees should be borne by the insurer.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1999). Where an insurer has filed a declaratory judgment action placing at issue the amount of a minor's workers' compensation death benefits, and has withheld some benefits due some beneficiaries, it is within the equitable power of the Court and the costs provision of section 39-71-612, MCA (1999), to treat guardian fees as a cost to be assessed against the insurer.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2905, MCA (1999). The limitation on penalties and assessments stated in section 39-71-2905, MCA (1999), does not prevent the Workers' Compensation Court from ordering an insurer which filed a declaratory judgment action to compensate the reasonable fees of a guardian *ad litem* appointed by the Court to represent the interests of a minor child. Section 39-71-612, MCA (1999), does require the insurer to pay reasonable costs as established by the Court if there is a dispute over the amount of benefits due. While the insurer has evidently paid benefits on behalf of the minor, it has apparently not paid all benefits due beneficiaries and has filed a declaratory judgment action putting the amount of the minor's benefits at issue. It is within the equitable power of the Court and the costs provision of section 39-71-612, MCA (1999), to treat guardian fees as a cost to be assessed against the insurer.

Guardian and Conservator: Guardian *ad litem*. In the absence of guidance in Montana law regarding compensation of a guardian *ad litem* in the Workers'

Compensation Court, that determination must fall on general principles of equity and reasonableness. Contrary to the insurer's argument, the limitation on penalties and assessments stated in section 39-71-2905, MCA (1999), is inapplicable in the context of guardian costs. Compensation of a guardian is also not within the purview of the attorney's fees provisions of sections 39-71-611 and -612, MCA (1999). Section 39-71-612, MCA (1999), does require the insurer to pay reasonable costs as established by the Court if there is a dispute over the amount of benefits due. While the insurer has evidently paid benefits on behalf of the minor, it has apparently not paid all benefits due beneficiaries and has filed a declaratory judgment action putting the amount of the minor's benefits at issue. It is within the equitable power of the Court and the costs provision of section 39-71-612, MCA (1999), to treat guardian fees as a cost to be assessed against the insurer. In this context of this case, where the insurer commenced the litigation and stands to benefit the most from an order governing all beneficiaries, guardian *ad litem* fees should be borne by the insurer.

¶1 The question before the Court involves the source of compensation for a guardian *ad litem* appointed to represent the interests of a minor child in a declaratory judgment proceeding filed by the insurer. The Court previously considered the issue of guardian compensation in *Dixon v. State Compensation Insurance Fund*, 2001 MTWCC 40, but this matter presents different circumstances and involves different arguments from the parties.

¶2 The following facts are taken from the Court file and are relied upon solely for purposes of the present issue.

¶3 Steven R. Oliver (Steven, Sr.) died on October 6, 1999, as the result of injuries sustained earlier that week in the course and scope of employment. Liberty Northwest Insurance Corporation (Liberty) accepted liability and paid medical and funeral expenses. Liberty agrees it is liable for death benefits, however, on September 13, 2001, it filed a Petition for Declaratory Judgment, asking the Workers' Compensation Court to determine who are the beneficiaries entitled to payment. Possible beneficiaries include decedent's two natural children, who have different mothers, and the mother of each child. The insurer has evidently been paying some benefits on behalf of the two children.

¶4 While the insurer seeks an order as to all possible beneficiaries, the primary controversy involves the two mothers. At the time of his death, Steven, Sr. was living in Billings, Montana, with Brenda Halling (Brenda). He had lived with Brenda since June 1994. Their child, Siobhan, was born on October 19, 1996. Brenda claims she was a common law spouse of the decedent and claims entitlement to death benefits on behalf of herself and Siobhan.

¶5 While living with Brenda, and at the time of his death, Steven, Sr. was apparently still married to Deborah Klein Oliver (Deborah). They were married in August of 1984. Their

child, Steven Rick Oliver (Steven, Jr.), was born on March 27, 1985. Steven, Sr. and Deborah separated in December 1985 and evidently did not cohabit thereafter. In 1987, Steven Sr. filed a petition for dissolution of marriage in California, but in 1992, the divorce action was dismissed at the request of his lawyers. Deborah, who is living in California, claims entitlement to workers' compensation benefits as the result of Steven, Sr.'s death.

¶6 For thirteen or more years, Steven, Jr. has lived with his great-grandparents, Wilma and Jim Klein, in California. Wilma Klein (Wilma) was appointed guardian of Steven, Jr. by a California Court on October 24, 1988. Wilma is Deborah's grandmother. Some workers' compensation death benefits have apparently been paid to Wilma on Steven, Jr.'s behalf. Wilma's status as Steven Jr.'s guardian for general purposes in California does not make her his representative in a proceeding in this Court. See *James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7.

¶7 While the primary issue involves Brenda and Deborah, there is also an issue regarding who receives benefits on Steven, Jr.'s behalf. As Liberty points out, if Deborah is found to be entitled to workers' compensation benefits as the spouse of the decedent, she would ordinarily receive benefits on behalf of herself and her natural child. Section 39-71-723, MCA (1999). Because Deborah is not the guardian of Steven, Liberty alleges "a conflict between the rights of an alleged surviving spouse and her child." (Petition for Declaratory Judgment at 11.)

¶8 The present issue - compensation of a guardian *ad litem* - follows from this Court's appointment of Montana attorney Mr. Steven S. Carey as guardian *ad litem* for Steven, Jr. The appointment followed from the failure of Wilma, Steven's great-grandmother and guardian in California, to respond to the Petition for Declaratory Judgment on his behalf. Under Court rules, the Petition for Declaratory Judgment and a copy of the Court's Scheduling Order were served by certified mail on all named parties, including "Wilma Klein, as the legal guardian of Steven Rick Oliver, a minor." Brenda and Deborah filed responses through counsel, but no response was filed on behalf of Steven, Jr. The Court was, however, provided a return receipt with confirmation that the petition and Scheduling Order, addressed to Wilma, were received by James Klein on September 28, 2001.

¶9 On October 17, 2001, the Clerk of the Workers' Compensation Court forwarded a memo to Wilma noting that failure to file a response by October 31, 2001, "will result in the scheduling of a show cause hearing to determine why the relief requested in the petition should not be granted." On October 31, 2001, the Court had still received no response or communication regarding Steven, Jr. Because a minor's rights were at issue, the Court's hearing examiner telephoned Wilma in California. Wilma was aware of the case. She thought she had sent something to the Court, but could not say what or when it had been sent. The hearing examiner informed Wilma that the Court had appointed guardians *ad*

litem in the past to represent the interest of minors in similar cases. She asked that the Court appoint a guardian *ad litem* in Montana to represent Steven's interests.

¶10 By Order dated November 5, 2001, this Court appointed Mr. Carey as guardian *ad litem*, noting the Court's obligation, under *Hock v. Lienco Cedar Products*, 194 Mont. 131, 137, 634 P.2d 1174, 1177-78 (1981), to appoint a guardian *ad litem* when a minor's interests potentially diverge from the interests of other parties in a workers' compensation proceeding. While there is no disagreement among the parties that the appointment of Mr. Carey was necessary and appropriate under *Hock*, there is strong disagreement regarding the source of compensation for his services.

¶11 As noted above, this Court previously faced the issue of compensating guardians *ad litem* in *Dixon v. State Compensation Insurance Fund*, 2001 MTWCC 40. In *Dixon*, the Court initially proposed to the parties that guardian fees be paid by the insurer and later recouped from benefits through a schedule set by the Court. The potential beneficiaries objected and proposed that the insurer, State Compensation Insurance Fund, bear the cost of compensating the four guardians *ad litem* appointed in that case. In that particular case, given its history and unique posture, State Fund did not take a position on source of guardian fees.

¶12 In *Dixon*, the Court also faced the question of the amount of fees, concluding that "[t]he hourly rate of compensation for guardians *ad litem* in this matter is $75 per hour." Although recognizing that this rate is substantially less than the hourly rate charged by many Montana attorneys, the Court found this rate appropriate in light of ARM 24.29.3802, which states that attorneys representing claimants in workers' compensation matters may use a contingency fee arrangement or "a fee system based on time at a reasonable hourly rate not exceeding $75.00 per hour...."

¶13 Unlike the situation in *Dixon*, the insurer in this case, Liberty, vigorously opposes bearing the cost of guardian fees. While not contesting the Court's authority to appoint a guardian *ad litem* for a child, the insurer argues the Court does not have power to require the insurer to pay guardian or attorney-guardian fees. Liberty argues that section 39-71-2905, MCA (1995), limits the penalties and assessments that may be assessed against an insurer to those specifically provided within the Workers' Compensation Act (WCA) and that no provision exists within the WCA requiring an insurer to compensate a guardian *ad litem*.

¶14 Liberty further argues that the Court would, in essence, be requiring it to pay the attorney's fees of another litigant. While seeming to agree it is appropriate and necessary under Montana law for Mr. Carey to act as attorney for Steven, Jr., the insurer contends the only statutory authority for requiring an insurer to pay attorney's fees in a workers' compensation proceeding emanates from sections 39-71-611 and -612, MCA (1999). The

insurer argues both statutes require a finding of unreasonable conduct on the part of the insurer to support an award of attorney's fees.

¶15 Deborah, Brenda, and Steven, Jr. take a contrary view. Deborah argues that section 39-71-2905, MCA (1999), allows an order that Liberty pay guardian fees because "[p]aying for a guardian ad litem is not a 'penalty' or 'assessment' as contemplated by the statute. It is simply a cost that is necessary in certain situations." (Respondent Deborah Klein Oliver's Position Statement Regarding Source of Compensation for Guardian Ad Litem Fee at 4.) Brenda agrees. Similarly, Steven, Jr., through Mr. Carey, argues that sections 39-71-611 and -612, MCA (1999), govern attorney's fees in disputes between a claimant and insurer, but should not be read to cover the cost of a guardian *ad litem* in a declaratory judgment proceeding.

¶16 The Court agrees that compensation of a guardian *ad litem* is not within the purview of the attorney's fee provisions of sections 39-71-611 and -612, MCA (1999). While *Hock* does not provide express guidance on the compensation issue, it does indicate that appointment of a guardian *ad litem* is a unique situation arising from the Court's obligation to ensure that children's interests under the Workers' Compensation Act "must always be carefully guarded." *Id*., 194 Mont. at 136, 634 P.2d at 1177. The Court has inherent power to make such appointments.

¶17 In *Dixon*, 2001 MTWCC 40, ¶ 24-27, I briefly reviewed Montana statutes governing compensation of guardians in other contexts. In some cases the cost is a public expense. *Id*. at ¶ 26. I pointed out that no statute applies to the appointment of guardians *ad litem* in the Workers' Compensation Court. In absence of such statute, I determined that payment of the cost must be determined pursuant to equitable principles:

> ¶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.")

Id. at ¶ 27.

¶18 The limitation on penalties and assessments stated in section 39-71-2905, MCA (1999), is inapplicable in the context of costs of a guardian *ad litem*. Under section 39-71-612, MCA (1999), the insurer is required to pay reasonable costs as established by the Workers' Compensation Court if there is a dispute over the amount of benefits due. The insurer has evidently paid benefits on behalf of Steven, Jr. and does not seem to contest his right to receive benefits. Nevertheless, it also appears that it has not paid out all benefits

that may be due beneficiaries. Moreover, it has filed a declaratory judgment action which puts the amount of Steven, Jr.'s entitlement at issue. It is within both this Court's equitable power and the costs provision of section 39-71-612, MCA, to treat guardian fees as a cost to be assessed against the insurer.

¶19 Liberty argues that the Court has, in essence, appointed counsel, but "waived the requirement of an attorney retainer agreement." Liberty references section 39-71-613(1), MCA (1999), which provides that "[w]hen an attorney represents or acts on behalf of a claimant or any other party on any workers' compensation claim, the attorney shall submit to the department a contract of employment, on a form provided by the department, stating specifically the terms of the fee arrangement between the attorney and claimant." ARM 24.29.3802 sets forth parameters for fee arrangements in workers' compensation cases. Liberty appears to suggest that Mr. Carey's compensation should be either through contingency fee agreement or borne by Steven, Jr. alone at the $75 rate, as if Steven, Jr. were any other claimant seeking benefits before the Court.

¶20 The problem with this suggestion is that a guardian *ad litem* need not be an attorney. Where the guardian is an attorney he or she serves in a dual capacity, making determinations as to what is in the child's best interests and also advocating those determinations before the Court. The attorney fee provision is inapplicable to service as a guardian and does not become applicable merely because the guardian is also an attorney and can speak for himself or herself in Court proceedings.

¶21 Deborah, joined by the other claimants, argues that Liberty stands to benefit the most from the appointment of a guardian *ad litem*. Citing *Dixon*, she points out that if Liberty paid benefits based on its own determination of proper beneficiaries, and the Court "later determined it should have been paying different or additional beneficiaries, the [insurer] 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." *Dixon*, at ¶ 28.

¶22 Brenda asserts it would be unfair to reduce benefits of other claimants by guardian fees when they "never agreed to participate in payment for the guardian's services." She also argues it would be unfair to reduce Steven's own benefits in a situation brought about by the insurer. In addition, she asserts, as did Deborah, that

> Liberty has been holding back one third of the death benefits payable in this case for over two years. Payment of Mr. Carey's fees is a small cost to the insurer in light of this withholding and the interest Liberty has been earning on the unpaid benefits. There is the best source for payment of Mr. Carey's fees.

(Response of Brenda J. Halling Regarding Source of Compensation for Guardian *Ad Litem* at 2.)

¶23 Echoing several of the arguments noted above, Steven Jr. summarizes:

> Liberty is the appropriate source for guardian fees and most certainly will benefit the most from an order resolving the claims of all known beneficiaries. Further, Liberty has had the benefit of investing one-third of its admitted obligation. One would assume it intends to keep the interest. The appointment of a guardian relieves Liberty of its admittedly difficult situation and protects Liberty from potentially paying benefits to the wrong beneficiary and having to pay those benefits twice. It is a cost of doing business as a workers' compensation insurer who happened to insure a worker with a complicated beneficiary history.

(Position Statement Pertaining to Payment of Guardian *Ad Litem* Fees by Liberty at 4.)

¶24 The arguments made by the respondents and guardian *ad litem* are persuasive. I therefore find that Liberty is responsible for the payment of the reasonable fees of the guardian *ad litem* and that $75 an hour is a reasonable hourly fee.

ORDER

¶25 Liberty shall pay the fees of the guardian *ad litem* appointed in this case. The cost shall not be recouped from benefits ultimately deemed payable.

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

¶27 Mr. Carey's claim for hours worked will be subject to review for reasonableness by this Court.

DATED in Helena, Montana, this 7th day of January, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. R. Russell Plath
Mr. Geoffrey R. Keller
Mr. Steven S. Carey
Mr. Eric R. Martin (Courtesy Copy)
Submitted: December 21, 2001