IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 31

WCC No. 2002-0685

ROBERT HERNANDEZ

Petitioner

vs.

ACE USA

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant petitioned for a lump sum of his future permanent total disability benefits. The insurer's Montana claims adjuster recommended settlement but was overruled by the employer, i.e., by the insurer's insured. Claimant also seeks a 15% impairment award pursuant to *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

Held: Section 39-71-107(3), MCA (2001), requires insurers to designate a resident Montana claims adjuster with final settlement authority. Section 39-71-2203(3), MCA (2001), provides that an insurer is directly liable to claimants. ACE violated both sections by giving settlement authority to its insured employer. Since the Montana adjuster would have approved the lump-sum request and, more probably than not, the Department of Labor and Industry would have approved the settlement, the claimant is entitled to the $75,000 lump-sum conversion recommended by the Montana adjuster. He is also entitled to a $10,080 impairment award pursuant to *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

Topics:

Insurers: Adjusters. Under section 39-71-107(3), MCA (2001), insurers providing workers' compensation coverage in Montana must appoint a resident Montana claims adjuster and give that adjuster final settlement authority with respect to Montana workers' compensation claims.

Insurers: Adjusters. By giving its insured veto power over settlements, the insurer violated section 39-71-107(3), MCA (2001), which requires appointment of a resident adjuster with settlement authority.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-107(3), MCA (2001). By giving its insured veto power over settlements, the insurer violated section 39-71-107(3), MCA (2001), which requires appointment of a resident adjuster with settlement authority.

Insurers: Duties. By giving its insured veto power over settlements, the insurer violated section 39-71-2203(3), MCA (2001), which provides that insurers owe a direct duty to claimants to pay benefits.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2203(3), MCA (2001). By giving its insured veto power over settlements, the insurer violated section 39-71-2203(3), MCA (2001), which provides that insurers owe a direct duty to claimants to pay benefits.

Settlements: Authority. Where the evidence presented at trial shows that the insurer's Montana adjuster would have approved the $75,000 lump-sum settlement of claimant's future permanent total disability benefits, but the employer vetoed the settlement, and where the evidence shows, on a more likely than not basis, that a $75,000 settlement would have been approved by the Department of Labor and Industry, the settlement will be ordered by the Court.

Attorney Fees: Unreasonable Denial of Benefits. An insurer acts unreasonably when it allows a settlement proposed by its Montana adjuster to be vetoed by the employer/insured. Where the claimant has to petition the Court to effectuate the proposed settlement, he is entitled to attorney fees under section 39-71-612, MCA (1995).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-612, MCA (2001). An insurer acts unreasonably when it allows a settlement proposed by its Montana adjuster to be vetoed by the employer/insured. Where the claimant has to petition the Court to effectuate the proposed settlement, he is entitled to attorney fees.

Penalties: Insurer. A permanently totally disabled claimant receiving biweekly benefits is not entitled to a penalty where awarded a lump sum even though the insurer's denial of the lump-sum request was unreasonable. The lump sum was not due until approved either by the Department of Labor and Industry or the Workers' Compensation Court, therefore there was no delay in benefits. *Thompson v. CIGNA,* 2000 MT 306, ¶¶ 24-25, 302 Mont. 399, 14 P.3d 1222.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2907, MCA (2001). A permanently totally disabled claimant receiving biweekly benefits is not entitled to a penalty where awarded a lump sum even though the insurer's denial of the lump-sum request was unreasonable. The lump sum was not due until approved either by the Department of Labor and Industry or the Workers' Compensation Court, therefore there

was no delay in benefits. *Thompson v. CIGNA,* 2000 MT 306, ¶¶ 24-25, 302 Mont. 399, 14 P.3d 1222.

Jurisdiction: Original Jurisdiction. Where an insurer has violated, and continues at the time of trial to violate, provisions of the Montana Workers' Compensation Act which govern the payment of benefits, the Workers' Compensation Court has jurisdiction to order the insurer to desist from the violation and to enforce its order. *See State ex rel. Uninsured Emp. Fund, Division of Workers' Compensation v. Hunt,* 191 Mont. 514, 519, 625 P.2d 539, 542 (1981).

¶1 The trial in this matter was held on March 19, 2003, in Helena, Montana. Petitioner, Robert Hernandez (claimant), was present and represented by Mr. James G. Edmiston. Respondent, ACE USA, was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1 through 38 were admitted.

¶3 Witnesses and Depositions: Michele Fairclough, Robert Hernandez, and Robin Hernandez testified at trial. In addition, the depositions of Robert Hernandez and Robin Hernandez were submitted for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pre-Trial Order are:

¶4a Whether Petitioner is entitled to receive a lump sum of all of his future permanent total disability benefits in order to pay past due indebtedness and financially sustain himself and his family.

¶4b The amount of the present value of the lump sum of Petitioner's future permanent total disability benefits.

¶4c Whether the $20,000 limitation on lump sum advances of permanent total disability benefits under § 39-71-741, MCA is a unconstitutional limitation on claimant's rights under the Montana Constitution.

¶4d Whether Petitioner is entitled to an award of attorney fees and costs pursuant to §§ 39-71-611/612, MCA (1995).

¶4e Whether Petitioner is entitled to an award of the twenty percent penalty pursuant to § 39-71-2907, MCA (1995).

(Pre-Trial Order at 2.)

¶5 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 On March 9, 1997, the claimant was injured in the course and scope of his employment with Texaco, Incorporated. Texaco, through merger or otherwise, is now a part of Chevron Corporation and is now known as Chevron-Texaco, but will hereinafter be referred to only as "Texaco."

¶7 At the time of his injury, Texaco was insured by ACE USA (ACE).[(1)] ACE accepted liability for the industrial accident.

¶8 The claimant is permanently totally disabled (PTD). He has previously received a lump-sum advance of $18,000 on his future PTD benefits.

¶9 On November 9, 2001, claimant requested a lump summing of his remaining, prospective PTD benefits. The sum requested was $105,000. The request was to pay off claimant's debts and reduce his monthly expenses.

Robert is still in dire financial shape due to existing indebtedness at the time of his injury. He requires a lump sum to pay off a large portion of his debts, to allow him to live within his means and his SSDI income.

(Ex. 19.) Later on, at the claims adjuster's request, claimant's attorney furnished a list of indebtedness showing total debts of $103,820.91. (Ex. 21.)

¶10 At the time of the request, ACE employed Michele Fairclough (Fairclough) as its resident adjuster in Montana. Fairclough is an experienced adjuster and has given testimony in this Court on several occasions. Fairclough was apparently the only adjuster in Montana with any responsibility for this claim and was designated by ACE to adjust claims involving Texaco.

¶11 Following receipt of the request for a lump sum, Fairclough requested present value calculations for claimant's remaining benefits. Based on those calculations, and after applying the social security offset and deducting the $18,000 lump-sum advance, Fairclough calculated claimant's entitlement in a lump sum at $75,437. (Ex. 24 at 3.) Based on that calculation she requested $75,000 in settlement authority. Pursuant to policies of ACE, the request was submitted to Texaco employee Bill Liles, whose office was in Houston, Texas. (Ex. 25 at 2.)

¶12 Fairclough testified that at the time of the settlement proposal, she was the Montana adjuster for ACE with respect to ACE's Texaco account. However, her settlement authority was proscribed to $20,000. Settlements over $20,000 had to be approved by Texaco.

¶13 On December 28, 2001, Texaco notified Fairclough that it required that "the following [enclosed] form be completed on all authority requests." (Ex. 28.) In a closing paragraph, Texaco wrote:

It appears your request is simply paying a present value lump sum for the future benefits owed. If there is any possibility that his benefits might be terminated or reduced by other factors (premature death) then paying out benefits may be a more prudent option, unless some financial incentive were calculated to reduce future medical exposure or account for possible termination of benefit prior to ultimate payout.

(*Id*.)[2]

¶14 Fairclough answered the questions on the questionnaire and returned it to Texaco. (Ex. 29.) In a covering memo, she specifically requested "authorization for payment of future owed benefits in a lump sum using a present value discount" and informed Texaco that under Montana law she could not settle medical benefits. (*Id*.)

¶15 On January 23, 2002, Texaco rejected the proposed settlement, writing: "Upon review, we are not amenable to a lump sum settlement at this time." (Ex. 30.)

¶16 Fairclough thereafter advised claimant's counsel that "Ace is not interested in settling Mr. Hernandez's file in a lump sum at this time." (Ex. 31.) Claimant thereafter filed his present petition.

¶17 By the time of trial, ACE had terminated Fairclough's services with respect to its Texaco account. However, Fairclough testified that at the time of the settlement negotiations, and while she was still the adjuster in charge of the Texaco account, she would have offered a $75,000 lump sum if she had settlement authority.

¶18 Fairclough testified that 90 to 95% of settlements she submits to the Department of Labor and Industry (Department) under section 39-71-741, MCA, are approved by the Department. Given claimant's indebtedness, and that approval rate, I find it more probable than not that the Department would have approved a $75,000 lump-sum settlement of claimant's PTD benefits.

¶19 At trial, claimant indicated his willingness to accept the $75,000 proposed by Fairclough. However, in light of the Supreme Court decision in *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25, he also requested payment of a 15% impairment award in the amount of $10,080. Enough time has passed since he was determined to be permanently totally disabled, that the entire impairment award has accrued.

<u>CONCLUSIONS OF LAW</u>

¶20 As amended in 2001, section 39-71-107, MCA, requires all insurers providing workers' compensation insurance coverage in Montana to employ resident adjusters and to give those adjusters settlement authority with respect to Montana claims. Subsection (2) provides:

(2) All workers' compensation and occupational disease claims filed pursuant to the Workers' Compensation Act and the Occupational Disease Act of Montana must be adjusted by a person in Montana. For a claim to be considered as adjusted by a person in Montana, the person adjusting the claim is required to determine the entitlement to benefits, authorize payment of all benefits due, manage the claim, **have authority to settle the claim**, maintain an office located in Montana, and adjust Montana claims from that office. Use of a mailbox or maildrop in Montana does not constitute maintaining an office in Montana. [Emphasis added.]

¶21 While the law in effect at the time of the claimant's industrial accident governs the claimant's benefits and other substantive matters, *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), the same is not true with respect to procedural matters. Non-substantive and procedural matters are governed by the law currently in effect. *EBI/Orion Group v. Blythe,* 281 Mont. 50, 54, 931 P.2d 38, 40 (1997). Thus, the 2001 version of section 39-71-107, MCA, applies here.

¶22 Section 39-71-107(2), MCA, is plain and clear on its face and must be applied as written. *In re Marriage of Christian,* 1999 MT 189, ¶ 12, 295 Mont. 352, 983 P.2d 966. It requires that Montana adjusters "have authority to settle the claim." There is no qualification or dollar limitation on that requirement, thus, it is plain that the Montana adjuster must be given authority to fully settle claims. While a resident adjuster is not precluded from consulting her home office or colleagues outside Montana when evaluating a case for settlement, the insurer may not delegate final authority to approve or disapprove settlements outside Montana without violating section 39-71-107(2), MCA. ACE violated the section in failing to give Fairclough, the sole responsible adjuster in Montana, the independence to make her own settlement decision.[(3)]

¶23 Worse yet, ACE delegated settlement authority to its insured. That delegation violated not only the requirement of section 39-71-107(3), MCA, that it appoint a Montana adjuster with settlement authority but also section 39-71-2203(3), MCA, applicable to all Plan II (private) insurers. Section 39-71-2203(3) provides:

(3) Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that **the insurer shall be directly and primarily liable to and will pay directly to the employee** or in case of death to his beneficiaries or major or minor dependents, the compensation, if any, for which the employer is liable.

ACE's delegation of settlement authority to Texaco was a blatant violation of the direct duty it owed claimant.

¶24 Fairclough testified that had she had final settlement authority, she would have proposed the $75,000 settlement, an offer which claimant would have accepted. Under

section 39-71-741(1)(b), MCA, that settlement would have been submitted to the Department. Had it been approved, the settlement would have been final and would not have been subject to further review by the Court.[4] *See* § 39-71-741(7), MCA (1995).

¶25 However, since ACE did not approve the settlement, the matter became one over which the Court has jurisdiction. Section 39-71-741(7), MCA (1995), provided in relevant part:

(7) A dispute between a claimant and an insurer regarding the conversion of biweekly payments into a lump-sum is considered a dispute, for which a mediator and the workers' compensation court have jurisdiction to make a determination.

The same provision has carried over to current law but is presently codified in subsection (4) of the 2001 version of section 39-71-741, MCA.

¶26 Since the only obstacle to the consummation and submission of the settlement to the Department was the illegal conduct of ACE, I must give effect to Fairclough's recommendation for settlement and the claimant's acceptance of her recommendation. I have found as a matter of fact that had the $75,000 settlement proposal been submitted to the Department, it would have been approved. I therefore conclude and hold that the settlement agreement must now be approved by the Court based on my finding that the Department would have approved the settlement if it had been timely submitted to it.

¶27 In the interval between the claimant's lump-sum request and the trial of this matter, the Supreme Court has determined that PTD claimants are entitled to impairment awards in addition to their PTD benefits. *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25. Whether or not any final settlement agreement, if effectuated in the fall of 2001 or early 2002, would preclude the claimant from seeking an impairment award, ACE (through Texaco) vetoed the settlement. It cannot benefit from its own wrongdoing and now claim that the settlement it vetoed should preclude claimant from seeking the impairment award to which he is now entitled. ACE shall therefore pay claimant a $10,080 impairment award in addition to the $75,000 lump sum.

¶28 Claimant also requests attorney fees and a penalty with respect to the $75,000 lump sum. While an award of either requires a finding of unreasonable conduct on the part of the insurer, the conditions for an award of attorney fees are different than for a penalty.

¶29 Section 39-71-612, MCA (1995), provides:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the

amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

The criteria for an award of attorney fees is met. First, the claimant has established an immediate entitlement to $75,000; the insurer offered nothing more than to continue biweekly benefits. He has therefore shown that the award made by this Court is greater than the amount paid or offered by the insurer. Second, he has demonstrated that the insurer's conduct was unreasonable. Indeed, it was *per se* unreasonable. The insurer disregarded two express provisions of Montana law. But for its disregard, a $75,000 lump-sum settlement would have been reached and paid in the fall of 2001 or early 2002. Therefore, claimant is entitled to attorney fees.

¶30 Section 39-71-2907, MCA (1995), governs claimant's request for a penalty. In relevant part, the section provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

Subsection (b) does not apply and under subsection (a) there must be a delay in paying benefits which are plainly due and payable. The failure to approve a lump sum, even though unreasonable, does not give rise to a penalty because the payment does not become due and payable until a settlement agreement is approved by the Department or ordered by this Court. *Thompson v. CIGNA,* 2000 MT 306, ¶¶ 24-25, 302 Mont. 399, 14 P.3d 1222. The fact that ACE violated Montana statutes by failing to give its Montana adjuster full settlement authority and by delegating settlement authority to its insured does not change the rule. The request for a penalty must therefore be denied.

¶31 Claimant also asks that the Court issue a "bad faith" holding. It cannot do so. Its authority is limited to determining whether the insurer has acted unreasonably. Both sections 39-71-612(3) and 39-71-2907(3), MCA (1995), expressly provide that a finding of unreasonableness "does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18."

¶32 Finally, claimant asks that the Court commence contempt proceedings for ACE's violation of Montana statutes. While the Workers' Compensation Court has the same contempt powers as a district court, § 39-71-2901(2)(e), MCA (2001), ACE has not violated any specific Court order. Therefore, there is no basis for initiating a contempt proceeding.

¶33 It is clear, however, that ACE even at the time of trial was in violation of sections 39-71-107(2) and 39-71-2203(3), MCA (2001). Those sections directly affect the payment of benefits to claimants. This Court therefore has the jurisdiction to prescribe remedial action. "Although the Workers' Compensation Court is not vested with the full powers of a District Court, it nevertheless has been given broad powers concerning benefits due and payable to claimants under the Act." *State ex rel. Uninsured Emp. Fund, Division of Workers' Compensation v. Hunt,* 191 Mont. 514, 519, 625 P.2d 539, 542 (1981).[(5)] I have determined that remedial action in this case is to order ACE to give at least one of its Montana adjusters final settlement authority in all cases and bar it from permitting Texaco and any of its other insureds from in any way interfering with Montana adjusters in the settlement of Montana claims.

JUDGMENT

¶34 The claimant is entitled to, and ACE shall pay, a lump sum of $75,000 in settlement of the claimant's entitlement to future PTD benefits. In addition ACE shall pay claimant an impairment award of $10,080 in a lump sum.

¶35 Claimant is entitled to attorney fees in an amount to be determined by the Court in accordance with Court rules and procedures.

¶36 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶37 Claimant is not entitled to a penalty.

¶38 ACE shall forthwith designate a Montana claims adjuster with full and final authority to settle Montana workers' compensation claims. It shall also, forthwith, rescind any and all authority it has given Texaco and other insureds to veto or approve settlements and make it clear to its Montana claims adjuster that Texaco and other insureds do not have authority over settlements.

¶39 Within two weeks of this judgment, ACE shall file a report with the Court, accompanied by supporting documentation, demonstrating that it has complied with the previous paragraph 38.

¶40 This JUDGMENT is certified as final for purposes of appeal.

¶41 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 24th day of April, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Leo S. Ward
Submitted: April 22, 2003

1. Texaco was actually insured by Pacific Employers Insurance, a subsidiary of CIGNA Insurance. CIGNA was purchased by ACE USA.

2. The Court notes that the "premature death" consideration mentioned by Texaco is contrary to section 39-71-741(3)(c), MCA (1997), which provides:

(c) If the projected compensation period is the claimant's lifetime, the life expectancy must be determined by using the most recent table of life expectancy as published by the United States national center for health statistics.

3. Unlike the situation in the present case, many insurers doing business in Montana maintain offices in Montana with a staff of adjusting personnel or hire adjusting firms with a staff of personnel responsible for adjusting decisions. The holding in this case does not preclude an insurer from establishing a team of personnel *within Montana* responsible for adjusting decisions, so long as claimants or their representatives have access to an individual adjuster who promptly and responsibly represents the insurer's position on adjusting decisions, including decisions on settling cases. What section 39-71-107, MCA (2001), bars is exactly what happened in the present case, transferring final adjustment authority outside Montana.

4. Despite the reservations I expressed in *Martin v. The Hartford,* 2003 MTWCC 25, since settlements approved by the Department are not reviewable by the Court, I need not consider whether the Department has properly construed section 39-71-741(3), MCA (1995), as permitting approval of a lump sum of all future benefits where that lump sum exceeds $20,000. Moreover, I note that the 1995 version of section 39-71-741, MCA, has different language than the 1997 section at issue in *Martin.* Unlike the 1997 version,

subsection (3) of the 1995 version expressly states that future PTD benefits may be converted "in whole or in part."

5. If the Workers' Compensation Court does not have that jurisdiction, then the insurer's blatant disregard of Montana statutes should be referred to the Commissioner of Insurance and/or Attorney General for remedial action.