

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 47

WCC No. 2002-0685

ROBERT HERNANDEZ

Petitioner

vs.

ACE USA

Respondent/Insurer.

ORDER REGARDING REQUEST FOR CLARIFICATION

Summary: Respondent/Insurer moved for clarification of duties where an employer is self-insured pursuant to Plan I but has excess insurance coverage and where an insurer has a deductible that its insured employer must meet.

Held: The request is denied since there is no indication that there is a deductible in this case and the respondent is not an employer. Therefore there is no justiciable case or controversy.

Topics:

Declaratory Judgments: Case and Controversy. There must be an actual case and controversy between the parties for a declaratory judgment to lie. An issue which affects only non-parties is not justiciable.

Jurisdiction: Case and Controversy. To give rise to a justiciable issue, there must be an actual case and controversy between the parties. An issue which only affects non-parties is not justiciable.

Jurisdiction: Case and Controversy. Courts do not give advisory or abstract opinions, enter anticipatory judgments, declare social status, deal with theoretical problems, answer moot questions, or adjudicate purely academic matters.

¶1 In its Findings of Fact, Conclusions of Law and Judgment, this Court determined pursuant to the express requirement of section 39-71-107(2), MCA, that insurers providing workers' compensation insurance in Montana must employ in-state adjusters with full authority to settle claims. The division also reiterates the Court's prior holding that it is

unlawful to delegate settlement authority or claims decisions to the insured employers. (FFCL, ¶¶ 22 and 23.)

¶12 The Court now has before it ACE's motion for clarification regarding the duties of insurers, employers, and adjusters. Specifically, it suggests the need for further guidance in two situations:

There are at least two situations faced by workers' compensation insurers, third party administrators, and employers on a regular basis which require clarification from this Court. In the first situation, the insurer issues a policy with a substantial deductible, usually at least \$250,000.00, and often as high as \$500,000.00, or \$1 million per claim. In this situation, the insured employer is responsible for payment of the deductible amount out of its own pocket, and the insurer only pays on the claim after the deductible has been satisfied. Employers with significant deductibles operating in Montana include, but are not limited to, McDonald's Franchise, Hilton Hotel, Xerox Corporation, Payless Shoesource, Delta Airlines and Best Buy. In the second situation, the insured employer is self-insured up to a certain amount, normally at a minimum of \$50,000.00, and frequently \$500,000.00, and \$1 million per claim. The insurer acts as an excess carrier and only pays when the self-insured limit has been satisfied. COSTCO and Watkins & Shepard Trucking are examples of companies under this arrangement.

(ACE USA's Request for Clarification at 2.)

¶13 The Court understands the dilemma arising under the situations described by ACE. The statutes governing insurers speak in terms of insurers, self-insureds, and the State Fund and do not directly address the hybrid situations described. At least at first glance, they would appear to require every insurer to comply with the statutory dictates whether or not the employer has retained a significant deductible, and, similarly, to exempt any qualified Plan I self-insured from those dictates applicable to Plan II insurers and the State Fund even though it has an excess insurance policy. Whether hybrid or different rules emerge from a fuller review and interpretation of statutes governing duties under the three plans is a matter on which I express no opinion because it has not been briefed and does not presently present a justiciable controversy.

¶14 "Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Marbut v. Secretary of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988). In *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997), the Supreme Court laid out the following test to distinguish hypothetical questions from true cases and controversies:

The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.

ACE does not suggest that it is an excess insurer or that its insured has a deductible. Therefore, it does not appear that there is an "existing and genuine" controversy relating to its rights and duties. Therefore, it fails the first test.

¶15 While no justiciable controversy exists with respect to the parties in the present case, that does not mean that some employer with excess insurance or some insurer with a deductible payable by its insured employer may not petition the Court for declaratory judgment as to its duties in a specific case or with respect to a specific claimant. The duty to provide a resident adjuster with final settlement authority certainly affects the timeliness of adjustment, and may even affect the actual adjustment decision since a Montana adjuster familiar with Montana law may reach a different decision than a non-Montana adjuster. Similarly, an adjuster or insurer may reach a different conclusion than would the employer. Thus, a determination of duties may have a practical, concrete, and real affect on the adjustment of a particular claim, and give rise to a justiciable petition for declaratory judgment.

ORDER

¶16 ACE USA's Request for Clarification is treated as a motion to amend or reconsider the Court's Findings of Fact, Conclusion of Law and Judgment. The request is **denied**.

DATED in Helena, Montana, this 3rd day of July, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Mr. Leo S. Ward

Submitted: June 3, 2003