

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 42

WCC No. 9902-8165

STATE COMPENSATION INSURANCE FUND,

Petitioner,

vs.

ANDERSON LOGGING COMPANY, INCORPORATED,

Employer,

LOWELL McMILLAN,

Respondent/Claimant.

SUMMARY JUDGMENT ORDER AND MEMORANDUM

AFFIRMED 8/23/01

Topics:

Constitution, Statutes, Regulations and Rules: 39-71-414. Given the Supreme Court's rulings in *Ness v. Anaconda Mineral's Co.*, 279 Mont. 472, 478, 929 P.2d 205, 210 (1996) and *Zacher v. American Insurance Co.*, 243 Mont. 226, 694 P.2d 335, 338 (1990) that an insurer has no subrogation rights until a claimant has been made whole for his entire loss, the insurer's subrogation rights under section 39-71-414(1), MCA (1985) begin after claimant has been made whole for his gross damages or loss, not after he recovers the amount of net judgment he received following trial against a third-party after taking his own contributory negligence into account.

Subrogation. Where the Supreme Court in *Ness v. Anaconda Mineral's Co.*, 279 Mont. 472, 478, 929 P.2d 205, 210 (1996) and *Zacher v. American Insurance Co.*, 243 Mont. 226, 694 P.2d 335, 338 (1990) has made clear that an insurer has no subrogation rights until a claimant has been made whole for his entire loss, the insurer's subrogation rights under section 39-71-414(1), MCA (1985) begin after claimant has been made whole for his gross damages or loss, not after he recovers the amount of net judgment he received following trial against the third-party after taking his own contributory negligence into account.

¶1 The present matter is presented to the Court upon stipulated facts. At issue is the State Compensation Insurance Fund's right to subrogation.

¶12 The essential facts can be briefly summarized. The claimant suffered a serious industrial accident on July 13, 1987. He brought a third-party action against the United States of America and a United States District Court fixed his damages at \$4,762,686.00, however, it reduced the award to \$2,619,477.00 based on claimant's contributory negligence (45%). After attorney fees and costs, claimant netted \$1,888,899.75. As of January 4, 2000, the State Fund had paid \$782,411.85 in compensation and medical benefits and has continued to pay \$278.96 weekly in total disability benefits and \$2,926.98 monthly for domiciliary care.

¶13 The State Fund petitioned this Court, requesting a determination of its subrogation interests in the claimant's third-party recovery. It asserts that it is entitled to cease paying benefits because claimant has obtained full redress for his injuries. It argues that the \$2,619,477 net judgment establishes the amount claimant must receive for subrogation to kick in. Since claimant has now been paid more than that, it argues it should be relieved of liability for further compensation and medical benefits. Its arithmetic is as follows:

State Fund's Arithmetic	
Net third-party recovery	\$2,619,477.00
Workers' Compensation benefits to date	\$782,411.85
Less attorney fees	(\$654,869.25)
Less litigation costs	(\$75,708.00)
Total recovery as of January 4, 2000	\$2,671,311.60
State Fund overpayment as of January 4, 2000	\$51,834.60

(Response to Respondent's Motion for Summary Judgment at 5.)

¶14 Claimant, on the other hand, asserts that the amount necessary to make him whole is \$4,672,686, which is the amount of his total damages as determined by the District Court. His arithmetic shows he must receive some \$2 million more in benefits before he is made whole:

Claimant's Arithmetic	
Total damages per District Court	\$4,762,686.00
Less total recovery as of January 4, 2000	(\$2,671,311.60)

Balance necessary for full recovery of loss	\$2,091,374.40
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Discussion

¶15 The issue presented is whether subrogation is determined by claimant's gross damages or loss, or by the amount of a net judgment after taking contributory negligence into account. The issue is one of law and one of first impression.

¶16 At the time of the claimant's injury, the Montana Workers' Compensation Act provided that where a third-party action is prosecuted "the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act." § 39-71-414(1), MCA (1985). As noted in *Ness v. Anaconda Mineral's Co.*, 279 Mont. 472, 478, 929 P.2d 205, 210 (1996),

while this latter statute set forth an insurer's entitlement to subrogation, it did not set forth whether this right to subrogation began before or after the claimant was made whole.

This Court determined that an insurer was not entitled to invade a claimant's paid third party claim via subrogation until the claimant had been made whole. . . .

The "made whole" doctrine was discussed at length in *Ness*. The Court reaffirmed its decision in *Zacher v. American Insurance Co.*, 243 Mont. 226, 694 P.2d 335, 338 (1990), that "where a workers' compensation claimant recovers against a third party **an insurer has no subrogation rights until a claimant has been made whole for his entire loss and any costs of recovery, including attorney fees.**" [Emphasis added.]

¶17 In this case, the full measure of claimant's loss is \$4,762,686. Under *Zacher* that is the amount which claimant must recover before the State Fund is entitled to subrogation.

¶18 State Fund argues that the concepts of "full legal redress," guaranteed by Article II, section 16 of the Montana Constitution, and "made whole," which has equitable origins, have been improperly merged in the Supreme Court's subrogation decisions. State Fund believes "there is a substantial basis for the Workers' Compensation Court and the Supreme Court to reconsider the concepts of 'full legal redress' and 'made whole' and to restore the meaning intended by the framers of the Montana Constitution." (response to motion for summary judgment at 4.) It argues that claimant received his "full legal redress" when awarded \$2,619,477, and that this amount should be the basis for its right to subrogation. (*Id.*)

¶19 The State Fund's arguments may well merit consideration, however, its arguments should be addressed to the Supreme Court. This Court is required to follow and apply *Zacher* and *Ness*. The Supreme Court has clearly spoken with regard to subrogation, adopting the "made whole" doctrine, and that is the doctrine the Court must apply.

JUDGMENT

¶10 Based on the foregoing discussion,

¶11 IT IS HEREBY ORDERED AND ADJUDGED that the State Fund has no right to subrogation with respect to claimant's third-party recovery until the net amount of claimant's third-party recovery added to his workers' compensation benefits equal \$4,762,686. The State Fund's petition for trial is **dismissed with prejudice**.

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

¶13 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶14 Any party to this dispute may have 20 days in which to request a rehearing from this summary judgment.

DATED in Helena, Montana, this 29th day of June, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Curtis E. Larsen

Mr. Allan M. McGarvey

Mr. Thomas E. Martello

Submitted: March 20, 2000