IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 36

WCC No. 2003-0573

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

AMY MACKEY

Respondent.

SUMMARY JUDGMENT

Summary: Claimant entered into a written agreement providing that she would pay UEF one-third of "any recovery" over $10,000 from the uninsured employer in return for the UEF's assignment of its rights against the employer. Claimant thereafter recovered $47,519 from the employer, however, claimant now asserts that the one-third due the UEF is one-third of the amount remaining after attorney fees and $10,000 are deducted.

Held: The agreement is clear on its face, providing for one-third of any recovery after deduction of only the $10,000. It does not provide for one-third of any "recovery after deducting attorney fees" or one-third of the "net recovery." Even if ambiguous, the pre-agreement correspondence between the parties clearly indicates that attorney fees were to be taken out of the claimant's share only. Therefore, the UEF is owed one-third of $37,519.

Topics:

> **Contracts: Construction: Plain Meaning.** A contract which is plain and unambiguous on its face must be construed and applied as written. The word "recovery" used in connection with recovery by claimant from an uninsured employer, means the actual amount of money recovered by the claimant from the employer without deduction for attorney fees.
>
> **Contracts: Construction: Inserting Provisions.** Where a contract is plain and unambiguous on its face a court cannot insert additional or qualifying provisions. Where a settlement agreement between the UEF and a claimant provides that the UEF is to receive one-third of "any recovery" by claimant from the uninsured

employer, the Court may not insert a provision allowing claimant to deduct her attorney fees from the recovery before applying the UEF's one-third share.

Contracts: Construction: Ambiguity. Where a contract is ambiguous, the Court may consider the circumstances surrounding the execution of the contract, including correspondence leading up to the agreement, in construing the agreement.

¶1 The Uninsured Employers' Fund (UEF) petitions the Court for its share of Amy Mackey's (claimant's) recovery in a third-party action. Its entitlement is pursuant to a written agreement between the UEF and claimant. At issue is the meaning of claimant's agreement "to pay the Fund [UEF] 1/3 of any recovery in the Mackey v. Frownfelters action over $10,000" in return for an assignment of the UEF's rights against the (Frownfelters), who were the uninsured employers of claimant. (Ex. B to UEF's Brief in Support of Motion for Summary Judgment.)

¶2 Both parties move for summary judgment. The UEF urges that the one-third is on actual amounts recovered by claimant without deduction for attorney fees and costs. Claimant urges that the one-third applies to amounts received from the Frownfelters *after* attorney fees and costs are deducted.

Uncontroverted Facts

¶3 The following facts are taken from admitted paragraphs of the petition and uncontroverted written correspondence between the parties in this action.

¶4 On April 8, 1989, claimant injured her back while working for Royal Pines Equestrian Center, which was owned by the Frownfelters. She made a claim for compensation.

¶5 The Frownfelters were uninsured. Therefore, the UEF accepted liability for the claim and began paying benefits.

¶6 By early 1992, the law firm of McGarvey, Heberling, Sullivan and McGarvey were representing claimant with respect to a third-party action against the Frownfelters.

¶7 On February 15, 1992, Allan McGarvey wrote Cheryl Russell, who was the UEF's adjuster, a letter requesting that the UEF enter into "a prelitigation agreement as to the amount of the Uninsured Employers' Fund's interest in an independent cause pursued by Amy Mackey against Donald and June Frownfelter, Frownfelter Construction, and/or Frownfelter Construction, Inc." (Ex. A to Reply Brief in Support of UEF's Motion for Summary Judgment, and Response in Opposition to Mackey's Motion for Summary Judgment, emphasis added.) The letter then made the following proposal:

> As you are aware, the costs and risks of pursuing such an independent action may be prohibitive if the Uninsured Employer's Fund were to demand priority interest in

> the recovery. We propose that Amy Mackey retain our offices to pursue this matter at her own risk and expense. **Any recovery obtained would be split as follows - - The first $10,000 would go to Amy Mackey and her attorney. Thereafter, our recovery would be split 1/3 to the Uninsured Employer's Fund and 2/3 to Amy Mackey and her attorney.** [Emphasis added.]

(*Id*.)

¶8 On February 25, 1992, Russell wrote back to McGarvey. The letter discussed other matters, then turned to McGarvey's proposal:

> On another note, the proposal outlined in your February 13, 1992 letter is acceptable to the Uninsured Employers' Fund. **If Amy should recover any monies in a civil action, the Fund will receive 1/3 of any amount over $10,000.**

(Ex. B to Reply Brief in Support of UEF's Motion for Summary Judgment, and Response in Opposition to Mackey's Motion for Summary Judgment, emphasis added.)

¶9 On March 27, 1992, Heberling wrote Russell the following letter:

> Dear Cheryl:
>
> This will confirm our conversation of 3/26/92. We discussed the letter of Allan McGarvey of 2/13/92 and your response of 2/25/92. I believe we will be in a stronger position with the Court if we have an assignment of the Fund's rights under § 39-71-506, MCA.
>
> I suggest the following agreement:
>
> The parties agree as follows:
>
> 1. **Amy Mackey agrees to pay the Fund 1/3 of any recovery in the <u>Mackey v. Frownfelters</u> action over $10,000.**
>
> 2. The Fund assigns to Amy Mackey its rights to sue the uninsured employer under § 39-71-506, MCA.
>
> 3. This assignment also covers and discharges the Fund's subrogation rights under § 39-71-505, MCA, referencing § 39-71-414, MCA.
>
> If the Fund approves this agreement, please sign below.
>
> Yours sincerely,
> <u>\s\ Jon L. Heberling</u>
> JON L. HEBERLING
>
> JLH:mvh

APPROVED:

\s\ Cheryl Russell
Cheryl Russell
Uninsured Employers Fund

(Ex. B to UEF's Brief in Support of Motion for Summary Judgment, emphasis added.) Russell signed the letter on the signature line provided for her approval and returned the signed letter to Heberling.

¶10 In an affidavit filed in connection with the summary judgment motions, Heberling says:

> I recall discussions with Cheryl Russell of UEF. I do not specifically recall reviewing attorney fees with her, but believe I probably did communicate to her that the recovery was net of fees. Our discussion was comprehensive and probably included that.

(Heberling Aff., ¶ 15 D.) In preface to the statement, Heberling also says, "My recollection of the events of early 1992 is dim, but I do recall the following *circumstances:*" (*Id.*, ¶ 15; italics added.) The UEF has filed no counter to his statements.

¶11 Heberling also states in his affidavit:

> As of 1992, I had done a number of cases involving subrogation or other agreements with insurers, relating to the proceeds of litigation with a third party. I was and am familiar with standard practice in this regard. Some agreements with insurers were in writing. Some were verbal. Arrangements were routinely made net of fees and costs in the District Court action, whether the agreement specifically so stated or not. It was standard practice to recognize the attorney's lien on any recovery in a District Court action.

(Heberling Aff., ¶ 13.) Claimant, however, does not provide any evidence that the UEF was aware of such practice, nor does she provide any details concerning the specific agreements, oral or written, which gave rise to such practice.

¶12 Claimant filed a civil action against the Frownfelters in the District Court for Flathead County. On September 21, 1993, judgment was entered in her favor in the sum of $116,273.13.

¶13 Between 1994 and 1999 the claimant collected a total of $47,519 on the Frownfelters' judgment. Both Frownfelters have declared bankruptcy, thus no further collection on the judgment is anticipated.

¶14 Claimant ultimately tendered a check for $4,513.96 to the UEF as its part of the collections. She arrived at that amount by first deducting her attorney fees of $20,969.00 from the $47,519.00, then subtracting the $10,000.00 due her, and finally applying a one-

third share against the remaining $13,542.00. In this action, she contends that she properly deducted the attorney fees before computing the UEF's one-third share, while the UEF argues that it is entitled to one-third of $37,519, which is the gross amount claimant received after deducting the $10,000 allocated to her in the partie's litigation agreement.

¶15 The UEF has paid approximately $150,000 in compensation and medical benefits for claimant.

Discussion

¶16 The present case involves interpretation of the written agreement between the parties. As with statutes, where the language of a contract is clear and unambiguous it must be construed and applied as it is written. *Van Hook v. Jennings,* 1999 MT 198, ¶ 11, 295 Mont. 409, 983 P.2d 995. The March 27, 1992 letter agreement, which was authored by Heberling, is clear and unambiguous: it entitles the UEF to one-third of claimant's recovery from the Frownfelters after deducting $10,000. "Recovery" is **unqualified**. The agreement does not say "recovery after deducting attorney fees," nor does it say "net recovery," and the Court cannot insert any such provision or qualification. *Topco, Inc. v. State, Dept. of Highways,* 275 Mont. 352, 358, 912 P.2d 805, 809 (1996) ("Where contract provisions are unambiguous, the courts have no authority to insert provisions in, or delete provisions from, the contract.") The claimant recovered $47,519 from the Frownfelters, and that amount is her "recovery." Therefore, the UEF is entitled to one-third of $37,519, or $12,506.33.

¶17 Even if the agreement were ambiguous, the ambiguity would be resolved against claimant. The circumstances surrounding the agreement may be considered in resolving any ambiguity, *Weinberg v. Farmers State Bank of Worden,* 231 Mont. 10, 24, 752 P.2d 719, 728 (1988), and the written correspondence leading up to the agreement clearly indicates that the parties did not contemplate any deduction of attorney fees before application of the UEF's one-third share. In McGarvey's February 15, 1992, letter, he stated:

> We propose that Amy Mackey retain our offices to pursue this matter at her own risk and expense. **Any recovery obtained would be split as follows - The first $10,000 would go to Amy Mackey and her attorney. Thereafter, our recovery would be split 1/3 to the Uninsured Employer's Fund and 2/3 to Amy Mackey and her attorney.**

(Ex. A to Reply Brief in Support of UEF's Motion for Summary Judgment, and Response in Opposition to Mackey's Motion for Summary Judgment, emphasis added.) The bolded language, particularly that portion which is underlined, leaves no doubt that claimant's attorneys were to receive their share out claimant's $10,000 and two-thirds shares, not out of the one-third share due the UEF.

¶18 While claimant has tendered her attorney's affidavit in derogation of the above conclusion, Mr. Heberling's statement about his communications with the UEF and his understanding of the agreement, assuming them to be true, fall short of the sort of evidence which would lead me to a different conclusion. Heberling only "believes" that he "probably" told the UEF adjuster that recovery was "net of fees" and expressly concedes he has no specific recollection of discussing attorney fees with the adjuster. (Heberling Aff., ¶ 14(d).) His belief is insufficient to contradict the specific written representation made in McGarvey's letter.

¶19 As to Heberling's understanding of the "practice" involving division of recoveries with insurers, assuming his understanding is true and accurate, it is also insufficient to contradict the specific representation made by McGarvey. Any practice may be over-rode by the parties' agreement in a particular case. Here there was express discussion of the division by McGarvey in his letter, discussion which contradicts any understanding by Heberling. Moreover, Heberling's affidavit does not indicate any awareness of the UEF of such practice.

¶20 I therefore conclude that even if the ultimate agreement is ambiguous, claimant has not presented any facts which, if true, would entitle her to a trial or to a different conclusion regarding the meaning of "recovery."

JUDGMENT

¶21 The UEF is entitled to one-third of claimant's recovery from the Frownfelters after deduction of $10,000.00 for claimant and without any reduction for attorney fees. It is therefore entitled to, and claimant shall pay the sum of $12,506.33.

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

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

DATED in Helena, Montana, this 6th day of May, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Julia W. Swingley
Mr. Jon L. Heberling
Submitted: April 14, 2003