IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 115

WCC No. 8906-5395

HARRY A. NESS

Petitioner
vs.

ANACONDA MINERALS COMPANY, a division of ATLANTIC RICHFIELD COMPANY, INCORPORATED

Respondent.

ORDER AND FINAL JUDGMENT

Summary: In case with long litigation history, the final issue presented for resolution was whether the insurer was entitled to a subrogation interest in claimant's settlement proceeds from a third party action. Expert testimony, even from respondent's expert, demonstrated claimant's economic losses exceeded his settlement recovery. Claimant's attorney in the third party action testified that settlement reflected the possibility that claimant would recover nothing at trial due to proof problems.

Held: Under current decisions of the Montana Supreme Court, *see Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335 (1990) *and* *Francetich v. State Compensation Insurance Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), an insurer has no subrogation interest in proceeds from a third party action until a claimant has in fact been made whole. The insurer's was erroneous in contending that the settlement amount, as a matter of law, established the amount that made claimant whole. **Note:** this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (Ness II).

Topics:

Subrogation. Under current decisions of the Montana Supreme Court, *see* *Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335 (1990) and *Francetich v. State Compensation Insurance Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), an insurer has no subrogation interest in proceeds from a third party action until a claimant has in fact been made whole. The insurer's was erroneous in contending that the settlement amount, as a matter of law, established the amount that made claimant whole. **Note:** this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (Ness II).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-414, MCA (1981). Under current decisions of the Montana Supreme

Court, *see* *Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335 (1990) *and* *Francetich v. State Compensation Insurance Fund,* 252 Mont. 215, 827 P.2d 1279 (1992), an insurer has no subrogation interest in proceeds from a third party action until a claimant has in fact been made whole. The insurer's was erroneous in contending that the settlement amount, as a matter of law, established the amount that made claimant whole. **Note:** this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (Ness II).

This case has a long history. It has already been to the Supreme Court once. On March 24, 1993, that Court reversed the initial decision of this Court and remanded the case for further proceedings. Since remand the parties have proceeded in a leisurely and piece-meal fashion. The remaining issue has finally been submitted for decision. That issue is respondent's subrogation interest, if any, in a $75,000 settlement petitioner received with regard to a third-party claim against Caterpillar Tractor Company and Long Machinery (collectively referred to hereinafter as "Caterpillar").

The parties have stipulated that the Court shall determine the subrogation issue based upon an agreed record and discovery on file with the Court. Since the facts are basically uncontested, this decision will be in narrative form.

Factual and Procedural Background

The essential facts and procedural background in this case are set forth in the decision of the Supreme Court and this Court's Decision Granting Partial Summary Judgment dated February 3, 1995. We will briefly summarize them here.

Petitioner, Harry Ness (claimant), was injured on October 14, 1981, while working for Anaconda Minerals Company (Anaconda). He was working on the belly pan of a D-8 Caterpillar when it fell and crushed him. He suffered severe, permanent and disabling injuries.

Anaconda, which was self-insured, accepted liability for claimant's injuries and began paying total disability benefits. On October 19, 1982, claimant's treating physician, Dr. James P. Murphy, concluded that claimant had reached maximum healing and rated the extent of claimant's impairment at 25% percent. Based on Dr. Murphy's finding of maximum healing, but lacking any medical release approving claimant's return to work, Anaconda terminated claimant's temporary total disability benefits effective December 8, 1982. It then began paying permanent partial disability benefits, and continued those benefits until November 18, 1987, at which time it discontinued all benefits.

On June 29, 1989, claimant filed a Petition for Hearing with this Court. He sought reinstatement of total disability benefits retroactive to December 8, 1982. A trial was held on September 5, 1989. On August 23, 1990, the Court entered judgment for Anaconda, concluding that claimant was not totally disabled after December 8, 1982. Claimant appealed.

On appeal the Montana Supreme Court reversed this Court's decision. The majority held that Anaconda improperly terminated claimant's temporary total disability benefits because it failed to comply with the four-part test established in *Coles v. Seven Eleven*

Stores, 217 Mont. 343, 704 P.2d 1048 (1985). *Ness v. Anaconda Minerals Company*, 257 Mont. 335, 339, 340, 849 P.2d 1021, 1024 (1993). That test requires:

(1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;

(2) a physician's determination of the claimant's physical restrictions resulting from an industrial accident;

(3) a physician's determination, based on his knowledge of the claimant's former employment duties, that he can return to work, with or without restrictions, on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;

(4) notice to the claimant of receipt of the report attached to a copy of the report.

Ness at 339-40, 849 P.2d at 1024 *(italics omitted)*. The Court found that as of December 8, 1982, only the first element had been satisfied. However, it went on to determine that by August 30, 1989, the first three elements of that test had been satisfied. It then concluded that Anaconda's liability for temporary total disability would cease on the date the fourth element was satisfied:

We conclude, however, that there was substantial evidence that as of August 30, 1989, the first three elements of the *Coles* test had been satisfied. **When there is proof of the date on which the fourth element of the *Coles* test has been satisfied, there will be substantial evidence for the termination of claimant's total disability benefits, and the commencement of partial disability benefits.** [Emphasis added.]

Id. at 340.

In reversing the judgment of this Court, the Supreme Court remanded the case with specific instructions, as follows:

The judgment of the Workers' Compensation Court is, therefore, reversed, and this case is remanded to that court with instructions to reinstate claimant's total disability benefits retroactive to December 8, 1982, **and continuing until the date on which claimant or his attorney were provided with notice of the report completed by Dr. James P. Murphy on August 30, 1989. At that point, claimant's disability status may be changed from total disability to partial disability**. [Emphasis added.]

Id. The Supreme Court also determined that claimant is entitled to attorney fees and instructed this Court to determine the amount of fees due. *Id. at 341.*

On remand, the issues have been expanded to include the matter of subrogation since any entitlement to subrogate may offset Anaconda's total liability. Both parties agreed to the addition of the issue and I deem the pleadings to be amended to add the issue.

Prior Motion for Partial Summary Judgment

Following remand the claimant filed a Motion for Partial Summary Judgment. The motion requested entry of partial summary judgment determining that claimant was entitled to total disability benefits from December 8, 1982 through February 21, 1994, the latter date being claimant's sixty-fifth birthday. The motion further asked for a determination that claimant was entitled to an attorney fee amounting to 40% percent of the benefits awarded in this action.

During pendency of the motion for partial summary judgment, the parties stipulated that on September 11, 1989, claimant received notice of Dr. Murphy's report. The parties further stipulated that the claimant's attorney fees could be computed in accordance with the contingent fee agreement as opposed to computed on an hourly basis.

On February 3, 1995, this Court entered a Decision Granting Partial Summary Judgment. That decision found that on September 11, 1989, the claimant and his attorney not only received notice of Dr. Murphy's report but also had an opportunity to read and copy it. I then held:

1. Claimant is entitled to temporary total disability benefits retroactive to December 8, 1982, through September 11, 1989. Anaconda is entitled to a credit for permanent partial disability benefits paid during that time and to any temporary total disability benefits it has already paid as a result of the Supreme Court decision.

2. Claimant is entitled to permanent partial disability benefits of $120.50 per week commencing September 12, 1989 and continuing for the duration of his partial disability, which shall not exceed 500 weeks. *Ness* at 340-41.

3. Claimant is entitled to attorney fees amounting to forty (40%) percent of all compensation received and to be received as a result of the Supreme Court decision in *Ness*. The actual amount due remains to be determined.

(Decision Granting Partial Summary Judgment, February 3, 1995)

Additional Factual and Procedural Background

Following entry of the partial summary judgment, the parties filed an Amended Final Pretrial Order in which they agreed to submit the subrogation issue for decision based upon the record to date and certain exhibits and depositions. Those materials show that during the pendency of the workers' compensation claim, claimant filed a third-party action against Caterpillar on account of his industrial accident. On or about July 13, 1992, claimant settled his claim with Caterpillar for $75,000. The settlement was well within policy limits of Caterpillar's insurance coverage. The parties agree that should the insurer be entitled to a subrogation interest in claimant's third-party recovery, the amount of that interest is the sum of $31,246.23.

Discussion

1. Jurisdiction

At the time of the claimant's injury the Workers' Compensation Act vested the Division of Workers' Compensation with original jurisdiction to resolve subrogation disputes. Section 39-71-414, MCA (1981), provided:

(5) If the amount of compensation and other benefits payable under the Workers' Compensation Act have not been fully determined at the time the employee, the employee's heirs or personal representatives, or the insurer have settled in any manner the action as provided for in this section**, the division shall determine what proportion of the settlement shall be allocated under subrogation**. The division's determination may be **appealed** to the workers' compensation judge. [Emphasis added.]

The Montana Supreme has interpreted this provision to mean exactly what it says. In *First Interstate Bank of Missoula v. Tom Sherry Tire,* 235 Mont. 48, 51-52, 764 P.2d 1287, 1289 (1988), the Court said:

[T]he statute shows that the Division is the proper forum for considering an insurer's subrogation rights in specified cases. The requirements are as follows. First, the employee's insurer is required to pay benefits and compensation according to the Workers' Compensation Act. Second, there must be a third-party action between the employee and the third party responsible for the injury. Third, only in those cases where the benefits are not determined at the time the third- party action is settled does the Division resolve the question of subrogation.
. . . .

It is clear that where the settlement of a third-party action precedes full determination of the workers' compensation claim, the Division is the proper forum for resolving the issue of the proper amount of subrogation allocated to the insurer.

After the Division has addressed the issue, the Workers' Compensation Court can consider an appeal of the subrogation matter.

Accord Malek v. Henry's Safety Supply Co., 242 Mont. 311, 314, 790 P.2d 965, 967 (1990); *Getten v. Liberty Mutual Ins. Co.,* 240 Mont. 90, 94, 782 P.2d 1267, 1270 (1989).

Malek and *State ex rel. Uninsured Employers' Fund v. Hunt,* 191 Mont. 514, 17-18, 625 P.2d 539, 542 (1981), suggest that while the Division may have jurisdiction to determine the amount of a subrogation interest, the Court has original jurisdiction to determine if subrogation is allowable at all. But even if this dispute is characterized as one involving the amount of the subrogation interest (claimant contending for zero and respondent for $31,246.23), and thus within the Department's jurisdiction, in 1991 the legislature deleted the reference to the Division of Worker's Compensation and Department of Labor and Industry[(1)] in section 39-71-414(5), MCA, thereby eliminating their jurisdiction to determine subrogation interests. Jurisdiction over subrogation issues thereby passed to the Workers' Compensation Court under its general jurisdiction to adjudicate issues concerning benefits. *See* § 39-71-2905, MCA, (1993); *State ex rel. Uninsured Employers' Fund v. Hunt,* 191 Mont. 514, 625 P.2d 539 (1981); *Malek v. Henry's Safety Supply Co.,* 242 Mont. 311, 790 P.2d 965 (1990).

As a general matter, the Supreme Court has repeatedly held that the law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). The rule derives from the general rule that laws are not to be applied retrospectively "unless expressly so declared", § 1-2-109, MCA, and constitutional proscriptions against ex post facto laws, *St. Vincent Hospital v. Blue Cross/Blue Shield of Montana,* 261 Mont. 56, 60, 862 P.2d 6, 8 (1993), and impairment of contracts, *see, e.g., Neel v. First Federal Sav. and Loan Assoc. of Great Falls*, 207 Mont. 376, 388, 675 P.2d 96, 103 (Mont. 1984).

Retroactive or retrospective applications of law, however, refer to laws which affect the substantive rights of the parties. A retrospective law is one "which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed." *City of Harlem v. State Highway Commission,* 149 Mont. 281, 284, 425 P.2d 718, 720 (1967). Where a change in the law does not affect substantive rights, an application of the law to preexisting facts does not constitute a retroactive application of the law and is thus not subject to the rule regarding retroactive laws. *St. Vincent Hospital* at 61, 862 P.2d at 9. Thus, a law changing the forum for adjudicating particular issues may be applied to current cases even though the operative facts of the case occurred prior to the change. *State Compensation Insurance Fund v. Sky Country, Inc.,* 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989). The Workers' Compensation Court has jurisdiction to determine the subrogation issue raised in this case.

2. Subrogation

The respondent contends that the Caterpillar settlement fully compensated claimant for his losses and that it is therefore entitled to $31,246.23. Claimant contends that his losses far exceed the combined amount of the Caterpillar settlement and his workers' compensation benefits, leaving nothing to which respondent's right of subrogation can attach. Resolution of their conflicting positions requires an analysis of the subrogation statute, § 39-71-414, MCA, and Montana Supreme Court cases interpreting it.

At the time of claimant's injury, section 39-71-414, MCA (1981), provided:

39-71-414. Subrogation. (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.
(2)(a) If the injured employee intends to institute the third party action, he shall give the insurer reasonable notice of his intention to institute the action.
(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including attorneys' fees.
(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.
(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including

attorneys' fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.
(3) If an injured employee refuses or fails to institute the third party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement which is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorneys' fees for prosecuting the action, have been deducted from the recovery.
(4) An insurer may enter into compromise agreements in settlement of subrogation rights.
(5) If the amount of compensation and other benefits payable under the Workers' Compensation Act have not been fully determined at the time the employee, the employee's heirs or personal representatives, or the insurer have settled in any manner the action as provided for in this section, the division shall determine what proportion of the settlement shall be allocated under subrogation. The division's determination may be appealed to the workers' compensation judge.

The 1983 version of the above section is identical to the 1981 version and was definitively interpreted by the Supreme Court in *Zacher v. American Insurance Co.*, 243 Mont. 226, 794 P.2d 335, (1990), as precluding any subrogation interest until claimant has been made whole for his entire loss and for the costs of recovery, including attorney fees. The Court said in *Zacher:*

We hold 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. In determining whether a claimant has been made whole, the amounts received and to be received under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss, pursuant to *Sec. 39-71-414, MCA (1983).* To the extent
that *Hall* and *Getten* contain requirements which may be interpreted as adding to the foregoing holding, *Hall* and *Getten* are expressly overruled.

243 Mont. at 231, 794 P.2d at 338.

Anaconda relies on two prior cases -- *Brandner v. Travelers Insurance Co.,* 179 Mont. 208, 587 P.2d 933 (1978) and *Getten v. Liberty Mutual Ins. Co.,* 240 Mont. 90, 782 P.2d 1267 (1989) -- as holding, in effect, that a claimant who settles a third-party claim for less than policy limits has been made whole as a matter of law. In each of these cases the Court held, without further discussion or specific evidence, that the claimant had been made whole by a third party settlement which was within policy limits.
In *Brandner* the Court noted, "It cannot logically be contended . . . that claimant has not been made whole for his Workers' Compensation injury, when he, by his own voluntary action, has finally compromised his claim in full against the third-party tort feasor."
In *Getten,* where the claimant settled for 1.5 million of a $6 million policy, the Court held that claimant had been fully compensated, pointing out that in *Brander* it had 'found that

the claimant was made whole by "a voluntary settlement in satisfaction of all claims" for an amount "not dictated by the upper limits of the insurance policy."' 240 Mont. at 95, 782 P.2d at 1271 (quoting from *Hall v. State Compensation Insurance Fund ,* 218 Mont. 180, 708 P.2d 234, 236 (1985)).

In *Zacher*, 243 Mont. at 231, 1794 P.2d at 338, and *Francetich v. State Compensation Ins. Fund,* 252 Mont. 215, 222, 827 P.2d 1279, 1284 (1992), *Brander* and *Getten* were expressly overruled, at least insofar as they were deemed inconsistent with the decisions in those cases. As set forth in the previous quotation from *Zacher*, the Court held that "[t]o the extent that *Hall* and *Getten c*ontain requirements which may be interpreted as additioning to the foregoing holding*, Hall* and *Getten* are expressly overruled." 243 Mont. at 231, 1794 P.2d at 338. The "foregoing holding" to which the Court referred was its holding that the workers' compensation insurer is entitled to subrogation only as to amounts received in excess of the claimant's "entire loss." In *Francetich* the Court put it this way when discussing the precedential value of *Brander*:

> The Court [in *Brandner*] also distinguished the situation in *Brandner* from the decision in *Skauge*. The basis for this distinction apparently was the Court's belief that the injured worker's voluntary settlement with the third party for less then [sic] the upper limits of the third party's insurance policy indicated that the worker had been fully compensated for his injuries. There is language in *Brandner* which might be viewed as indicating that subrogation might have been appropriate even if the injured worker had not been fully compensated for his injuries. To the extent that *Brandner* might be interpreted as allowing for subrogation prior to the injured worker receiving full compensation it is overruled.

252 Mont. at 222, 827 P.2d at 1284.

The discussion and wording in both cases suggests that the Supreme Court has rejected any per se rule which automatically deems a settlement for less than policy limits to be full compensation for the claimant's loss. The problem, of course, is that a third-party settlement for less than policy limits may reflect liability concerns. Where there is a risk of non-recovery because of liability issues, especially where the risk is substantial, the plaintiff may settle for less than his actual economic damages. As I read the Court's *Zacher* and *Francetich* decisions, while a settlement for less than policy limits may **in fact** mean that claimant has been made whole, it does not **as a matter of law** mean that he has been made whole.

Claimant's attorney in the third-party action, David Paoli, testified that the third-party action was settled for far less than claimant's actual losses because a crucial piece of evidence had been lost. (Paoli Dep. at 8-9.) That evidence, which was the tractor frame bracket that was allegedly defective, was key evidence regarding liability. (*Id.)* Thus, the settlement reflected a substantial risk of non-recovery. (*Id*.) Counsel for Caterpillar estimated the odds of a defense verdict at 80 to 20. (Maynard Dep. at 9.) Caterpillar's policy limits was in the millions of dollars. (*Id*. at 6.)

Based on expert economic advice, Paoli considered claimant's economic losses in the $350,000 to $400,000 range. (Paoli Dep. at 13.) Claimant's expert economist put

claimant's economic damages in the range of $409,087 to $440,628. (Delaney Dep. at 27-28.) The attorney for Caterpillar, who was called by respondent to rebut claimant's economic assessment, estimated claimant's economic damages at $145,000. (Maynard Dep. at 45-46; Dep. Ex. 1 at 24.) All of these amounts exceed the settlement.

I therefore conclude that the settlement with Caterpillar did not in fact represent the amount necessary to make claimant whole. Therefore, it does not entitle respondent as a matter of law to a subrogation interest in the settlement proceeds.

Since the parties stipulated to the amount of recovery if the Court finds a subrogation interest, it is apparent they contemplated that the Court choose between zero and the stipulated amount and that it conduct no fact-finding to determine what amount would be necessary to in fact make claimant whole. It is also apparent that respondent's position that it was entitled to a subrogation interest was predicated on its contention that the settlement, as a matter of law, established the amount which made claimant whole. Having failed to persuade the Court as to the correctness of its contention, the Court finds that respondent is not entitled to subrogation interest in the Caterpillar settlement.

FINAL JUDGMENT

1. The Court has jurisdiction over all of the issues raised and argued by the parties.

2. Claimant is entitled to, and respondent shall pay, temporary total disability benefits retroactive to December 8, 1982 through September 1989. Respondent is entitled to a credit for permanent partial disability benefits paid during that time period and to a credit for any additional benefits it has paid for that period on account of the Supreme Court decision or this Court's partial summary judgment entered February 3, 1995.

3. Claimant is entitled to, and respondent shall pay, permanent partial disability benefits of $120.50 per week retroactive to September 12, 1989, and continuing for the duration of his permanent partial disability, not to exceed 500 weeks.

4. Claimant is entitled to, and respondent shall pay, attorney fees in a sum equal to 40% of all compensation received and to be received as a result of the Supreme Court decision in this case and the judgment herein.

5. This Court retains jurisdiction to enforce this judgment.

6. This Judgment is certified as final for purposes of appeal.

7. Any party to this dispute may have 20 days in which to request a rehearing from this Order and Final Judgment.

Dated in Helena, Montana, this 29th day of December, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. R. Lewis Brown
Mr. Andrew J. Utick
Submitted: October 23, 1995

1. In 1989 the legislature substituted the Department for the Division. 1989 Montana Laws, ch. 613, § 64.