

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 77

WCC No. 9710-7839

GERALD L. THAYER, (DECEASED)

PHYLLIS THAYER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

RICHARD SMITH, d/b/a RRS, INCORPORATED

Employer.

DECISION AND JUDGMENT

Summary: Under section 39-71-511, MCA, Uninsured Employers' Fund ceased paying death benefits to widow of worker whose death resulted from burns received during the course and scope of employment for an uninsured employer. The UEF argues it was entitled to discharge the remaining \$74,301.22 of future benefits following the widow's recovery of \$100,000 from the uninsured employer in a tort lawsuit. The widow argues the UEF is not entitled to a set-off and that section 39-71-511, MCA is unconstitutional in that it violates the full redress provision stated in Article II, section 16 of the Montana Constitution.

Held: UEF is entitled to discharge the future benefits at issue under section 39-71-511, MCA. Because this is not the application of a subrogation interest under section 39-71-414, MCA, limits on subrogation under that statute do not apply. Application of the statute to permit discharge following recovery from an employer does not limit full legal redress under the Montana Constitution.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-511, MCA (1991). Under section 39-71-511, MCA, the Uninsured Employers' Fund is entitled to discharge the remaining \$74,301.22 of future benefits payable to decedent's widow based upon her recovery of \$100,000 from the uninsured

employer in a tort lawsuit. See also Montana Supreme Court decision affirming WCC, [*Thayer v. Uninsured Employer's Fund*](#), 1999 MT 304.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-511, MCA (1991). The statutory authorization that the UEF may discharge benefits payable to claimants of uninsured employers by the amount of third-party recovery does not violate the "full redress" provision of Article II, Section 16 of the Montana Constitution. See also Montana Supreme Court decision affirming WCC, [*Thayer v. Uninsured Employer's Fund*](#), 1999 MT 304.

Constitutions, Statutes, Regulations and Rules: Montana Constitution: Article II, section 16. The statutory authorization that the UEF may discharge benefits payable to claimants of uninsured employers by the amount of third-party recovery does not violate the "full redress" provision of Article II, Section 16 of the Montana Constitution. See also Montana Supreme Court decision affirming WCC, [*Thayer v. Uninsured Employer's Fund*](#), 1999 MT 304.

Subrogation. Under section 39-71-511, MCA, the Uninsured Employers' Fund is entitled to discharge the remaining \$74,301.22 of future benefits payable to decedent's widow based upon her recovery of \$100,000 from the uninsured employer in a tort lawsuit. The statutory authorization that the UEF may discharge benefits payable to claimants of uninsured employers by the amount of third-party recovery does not violate the "full redress" provision of Article II, Section 16 of the Montana Constitution. See also Montana Supreme Court decision affirming WCC, [*Thayer v. Uninsured Employer's Fund*](#), 1999 MT 304.

Uninsured Employers' Fund: Generally. Under section 39-71-511, MCA, the Uninsured Employers' Fund is entitled to discharge the remaining \$74,301.22 of future benefits payable to decedent's widow based upon her recovery of \$100,000 from the uninsured employer in a tort lawsuit. The statutory authorization that the UEF may discharge benefits payable to claimants of uninsured employers by the amount of third-party recovery does not violate the "full redress" provision of Article II, Section 16 of the Montana Constitution. See also Montana Supreme Court decision affirming WCC, [*Thayer v. Uninsured Employer's Fund*](#), 1999 MT 304.

¶1 This case is submitted on an agreed statement of facts and exhibits. The issue presented is whether the Uninsured Employers' Fund (UEF) may cut off death benefits based on a monetary recovery received in an action against the uninsured employer.

Factual Background

¶2 Gerald L. Thayer suffered fatal burns when his clothes caught fire while he was cutting scrap metal with a torch. Mrs. Phyllis Thayer, the petitioner herein, is his widow.

¶13 In a prior proceeding before this Court, I found that at the time of his accident Mr. Thayer was employed by Richard Smith (Smith) and acting within the scope and course of his employment. Since Smith was uninsured, I entered judgment against the UEF for medical and death benefits. *Gerald Thayer (deceased) by Phyllis Thayer v. Uninsured Employers' Fund*, WCC No. 9311-6942, Findings of Fact, Conclusions of Law and Judgment (December 8, 1994). Facts concerning the accident and the employment relationship are set forth in the prior decision.

¶14 Thereafter, Mrs. Thayer pursued negligence and wrongful death actions against Smith and Garry Thompson (Thompson), who worked for or with Smith.⁽¹⁾ She also brought negligence and products liability actions against the retail seller and the manufacturer of a chemical product Mr. Thayer had applied to his clothing as a fire retardant. Ultimately, Smith declared bankruptcy; however, his liability insurer paid \$100,000 to Mrs. Thayer. The remaining actions were settled for \$305,000, bringing the total amount received by Mrs. Thayer to \$405,000 before attorney fees and costs.

¶15 Based on the \$100,000 settlement with Smith's liability insurer, on June 25, 1997, the UEF terminated Mrs. Thayers' biweekly death benefits effective July 9, 1997.

¶16 Mr. Thayer's medical expenses alone were \$253,207.98. In addition, in the tort actions, Mrs. Thayer claimed the following damages:

Lost earnings	\$263,592.82
Funeral expenses	\$ 3,531.88
Pain and suffering ⁽²⁾	\$250,000.00
Wrongful death, loss of companionship, grief, etc.	\$1,000,000.00
Loss of services	<u>\$ 85,734.78</u>
Including medical expenses, the total damages claimed were	\$1,856,067.46.

¶17 The UEF's payments on this claim total \$156,878.78. Of that amount, \$85,000.00 was paid to the Montana Department of Public Health and Human Services (DPHHS) to reimburse it, at least in part, for medical payments it made for Mr. Thayer's treatment.⁽³⁾ The DPHHS released its lien, thus the UEF's obligation for medical expenses has been satisfied. The remaining \$71,878.78 represents biweekly benefits paid to Mrs. Thayer for the period October 22, 1992 through July 8, 1997. Absent the settlements, the UEF's additional exposure is \$74,301.22.⁽⁴⁾

Issues

¶18 The parties have separately set out their statement of issues. Mrs. Thayer frames her issues as follows:⁽⁵⁾

1. Is § 39-71-511 MCA, constitutional?
2. If § 39-71-511 is constitutional, is UEF entitled to a setoff when the Petitioner's damages exceed the third party recoveries from the uninsured employer?
3. If § 39-71-511 is constitutional, is UEF entitled to a setoff before the employee or his beneficiaries is made whole for their entire loss, including attorney fees and costs?
4. If § 39-71-511 is constitutional, is UEF entitled to a setoff for settlements which include damages that are in addition to medical expenses and lost earnings?
5. Were the actions of the UEF in terminating benefits unreasonable or did the UEF unreasonably delay or refuse to make the benefit payments?
6. If the actions of the UEF were unreasonable or if the UEF unreasonably delayed or refused to make benefit payments, what is the amount of attorney fees, costs, and statutory penalty to which Petitioner is entitled?

The UEF sets forth the following issue:

7. Does the UEF's application of § 39-71-511 MCA (1991), set off rights as to the \$100,000.00 paid by the uninsured employer, Richard Smith, deny Mrs. Thayer her right to full legal redress under the Montana Constitution, Article II, Section 16?

Discussion

I.

¶19 The Montana Workers' Compensation Act (WCA) requires every employer, with some exceptions, to provide workers' compensation insurance coverage for its workers. § 39-71-401, MCA. Coverage may be provided by insuring with the State Compensation Insurance Fund or a private insurer, or by self-insuring. (*Id.* and see Title 39, chap. 71, parts 21, 22 and 23.) In exchange for providing workers' compensation insurance to its workers, the employer is insulated from liability arising in tort on account of injuries the employee suffers at work. § 39-71-411, MCA.

¶10 The WCA establishes the UEF as a safety net for workers whose employers fail to provide insurance. Section 39-71-502, MCA, provides in relevant part:

39-71-502. Creation and purpose of uninsured employers' fund.

- (1) There is created an uninsured employers' fund. The purpose of the fund is to pay:

(a) to an injured employee of an uninsured employer the same benefits the employee would have received if the employer had been properly enrolled under compensation plan No. 1, 2, or 3, except as provided in 39-71-503(2); and

...

¶11 On its face, section 39-71-502(1)(a), MCA, requires that the UEF pay the same benefits as plan 1, 2 and 3 insurers and self-insurers. The section, however, does not stand alone. It must be read together with other sections. *Dale v. Trade Street, Inc.*, 258 Mont. 349, 357, 854 P.2d 828, 832 (1993) (Courts must "construe the several provisions of a statute to give effect to all, if possible."); *State v. Berger*, 259 Mont. 364, 367, 856 P.2d. 552, 554 (1993) ("We are required to avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used.").

¶12 Other sections limit the benefits payable by the UEF. Initially, section 39-71-503, MCA, provides a statutory appropriation for the UEF and limits the benefits payable by the UEF to the appropriated moneys. Since the appropriation may be insufficient to pay all benefits, the section also prioritizes benefits. The section provides:

39-71-503. Administration of fund -- appropriation.

(1) The department shall administer the fund and shall pay from it all expenses of administering the fund, all loss adjustment expenses for claims of injured employees of uninsured employers, and all proper benefits to injured employees of under insured and uninsured employers.

(2) Surpluses and reserves may not be kept for the fund. The department shall make payments that it considers appropriate as funds become available from time to time. The payment of weekly disability benefits takes preference over the payment of medical benefits. No lump-sum payments of future projected benefits, including impairment awards, be made from the fund. The board of investments shall invest the money of the fund. The cost of administration of the fund must be paid out of the money in the fund.

(3) The amounts necessary for the payment of benefits from this fund are statutorily appropriated, as provided in 17-7-502, from this fund.

The appropriation mentioned in subsection (3) is a permanent appropriation, § 17-7-502, MCA, based on moneys collected by the UEF under section 39-71-504, MCA.⁽⁶⁾

¶13 Section 39-71-503(2), MCA, indicates that UEF benefits are payable only to the extent of available funds. Section 39-71-510, MCA, makes that limitation express, providing:

39-71-510. Limitation on benefit entitlement under fund. Notwithstanding the provisions of 39-71-407, 39-71-502, and 39-71-503, injured employees or an

employee's beneficiaries who pursue a claim for benefits from the uninsured employers' fund are not granted an entitlement by this state for full workers' compensation benefits from the fund. Benefits from the fund must be paid in accordance with the sums in the fund. If the department determines at any time that the sums in the fund are not adequate to fully pay all claims, the department may make appropriate proportionate reductions in benefits to all claimants. The reductions do not entitle claimants to retroactive reimbursements in the future.

¶14 Section 39-71-511, MCA, places a further limitation on benefits payable by the UEF. The section provides:

39-71-511. Setoffs to claim against fund. A claim for benefits from the uninsured employer's fund must be discharged, finally or periodically, to the extent that an employee or the employee's beneficiaries receive actual monetary compensation by judgment or settlement from the uninsured employer, a third party who shares liability as defined in 39-71-412, or a fellow employee who shares liability as defined in 39-71-413.

The section is separate and distinct from the general subrogation right afforded plan 1, 2 and 3 insurers and self-insurers, § 39-71-414, MCA, and the grist for the present dispute.

II.

¶15 The UEF relies on section 39-71-511, MCA, in justifying its termination of Mrs. Thayer's benefits. To date it has paid Mrs. Thayer \$71,878.78. Absent the set-off provision of section 39-71-411, MCA, its further liability is \$74,301.22. The UEF argues that its liability for the \$74,301.22 was "discharged" by Mrs. Thayer's receipt of \$100,000 from Smith's insurer. It does not seek to recoup any benefits it has already paid her.

¶16 Mrs. Thayer contests the UEF's termination of benefits on both statutory and constitutional grounds.

III.

¶17 Mrs. Thayer's constitutional arguments can be considered only if the Court rejects her non-constitutional arguments:

Courts should avoid constitutional questions whenever possible. *Ingraham v. Champion Int'l* (1990), 243 Mont. 42, 46, 793 P.2d 769, 771. A court should not rule on the constitutionality of a legislative act if the court can decide the case before it without reaching constitutional considerations. *Taylor v. Dept. of Fish, Wildlife & Parks* (1983), 205 Mont. 85, 90, 666 P.2d 1228, 1231.

Wolfe v. State, Dept. of Labor and Industry, Bd. of Personnel Appeals ex rel. Helena Educ. Ass'n. 255 Mont. 336, 339, 843 P.2d 338, 340 (1992). Therefore, I must first address her non-constitutional arguments.

IV.

¶18 On statutory grounds, Mrs. Thayer argues that the UEF's termination of benefits amounts to a subrogation interest and is therefore subject to the same subrogation limitations applicable to insurers. She says:

UEF claims that it is not claiming a "subrogation interest". UEF's unsupported declaration does not change the nature of the statute. If something looks, talks, and acts like a duck, then it probably is a duck, no matter how vociferously one declares the contrary.

(Petitioner's Brief at 7.) Mrs. Thayer's arguments are unpersuasive for two reasons.

¶19 First, the subrogation statute is altogether inapplicable to the facts of this case. Section 39-71-414, MCA, provides in relevant part:

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. [Emphasis added.]

...

Section 39-71-412, MCA, provides actions against third-parties *other* than the employer or co-employees, providing in relevant part:

39-71-412. Liability of third party other than employer or fellow employee -- additional cause of action. The right to compensation and medical benefits as provided by this chapter is not affected by the fact that the injury, occupational disease, or death is caused by the negligence of a third party other than the employer or the servants or employees of the employer. Whenever such event occurs to an employee while performing the duties of his employment and such event is caused by the act or omission of some persons or corporations **other than his employer or the servants or employees of his employer**, the employee or in case of his death his heirs or personal representative shall, in addition to the right to receive compensation under this chapter, have a right to prosecute any cause of action he may have for damages against such persons or corporations. [Emphasis added.]

Section 39-71-413, MCA, provides in relevant part:

39-71-413. Liability of fellow employee for intentional and malicious acts or omissions -- additional cause of action. If an employee receives an injury while performing the duties of his employment **and the injury or injuries so received by the employee are caused by the intentional and malicious act or omission of a servant or employee of his employer**, then the employee or in case of his death his heirs or personal representatives shall, in addition to the right to receive compensation under the Workers' Compensation Act, have a right to prosecute any cause of action he may have for damages against the servants or employees of his employer causing the injury. [Emphasis added.]

The UEF's termination of benefits in this case is not based on Mrs. Thayer's recovery against a third-party (§ 39-71-412, MCA,) or on a recovery from a co-employee on account of an "intentional and malicious act or omission." It is based on her recovery from the employer. That recovery is not subject to subrogation under section 39-71-414, MCA.

¶20 Even if section 39-71-414, MCA, otherwise applied, Mrs. Thayer's "looks, talks, and acts like a duck" argument ignores basic rules of statutory construction. Where two sections are in conflict, the more specific section must be given effect. *Gibson v. State Compensation Mut. Ins. Fund*, 255 Mont. 393, 396, 842 P.2d 338, 340 (1992). Section 39-71-511, MCA, is a specific statute applicable to UEF payments and liability. On its face it provides for a dollar for dollar discharge of the UEF's statutory obligation to pay benefits. The discharge does not depend on claimant obtaining the full measure of his or her damages. It does not depend on the characterization of damages recovered. As the more specific statute, section 39-71-511, MCA, not the subrogation provision section 39-71-414, MCA, applies.

¶21 Mrs. Thayer's argument that the UEF is subject to the subrogation provisions of the WCA and that any setoff must consider the nature of her recovery are without merit. Issues 2 through 4 are answered in the negative. Therefore, the Court must consider her constitutional arguments.

V.

¶22 Mrs. Thayer's constitutional challenge is based on Article 2, section 16 of the 1972 Montana Constitution. The section provides:

Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. **No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation**

Laws of this state. Right and justice shall be administered without sale, denial, or delay.

The operative language for purposes of this appeal is bolded.

¶23 The "full legal redress" language of Section 16 has been interpreted by the Montana Supreme Court as precluding a workers' compensation insurer from recouping or discharging benefits until the claimant has been made whole in tort damages from a third-party. *Francetich v. State Compensation Mutual Ins. Fund*, 252 Mont 215, 827 P.2d 1279 (1992). This case, however, does not involve a workers' compensation insurer which paid a premium to provide insurance.

¶24 The UEF is not an insurer in the usual sense. It is State funded and State operated. It receives no premiums, it writes no policies. Rather, it is a safety net for workers whose employers fail to comply with the law requiring that they provide workers' compensation insurance coverage for their employees. But it is a limited safety net, limited to the funds it secures through statutory penalties and collections, and limited by the set-off provisions of section 39-71-511, MCA. Neither this Court nor the Supreme Court have examined the applicability of the *full legal redress* guarantee in this context.

¶25 In determining whether the full redress language of section 16 of Article II applies to a State safety net, I am guided by the history of the section as set forth in the minutes of the 1972 Constitutional Convention and quoted in *Trankel v. Montana Dept. of Military Affairs*, 282 Mont. 348, 938 P.2d 614 (1997). The minutes of the Convention indicate that *full redress* language was intended to overturn a prior Montana Supreme Court decision in *Ashcraft v. Montana Power Co.*, 156 Mont. 368, 480 P.2d 812 (1971). *Ashcraft* held that an employee covered by workers' compensation insurance could not sue a third-party [someone other than the employer] for injuries suffered during his or her employment. *Trankel* 282 Mont. at 359, 938 P.2d at 621. The Supreme Court said in *Trankel*:

It is clear from the minutes of the Constitutional Convention that the second sentence of Section 16 was in response to our decision in *Ashcraft v. Montana Power Co.* (1971), 156 Mont. 368, 480 P.2d 812. In that case, the plaintiff was injured while working on behalf of his employer on property owned by the Montana Power Company. He sued the power company based on his allegation that its negligence caused his injury. *Ashcraft*, 156 Mont. at 369, 480 P.2d 812-13. On appeal, this Court held that pursuant to § 92-438, RCM (1947), the power company could not be sued because it had required the plaintiff's employer to carry workers' compensation coverage. *Ashcraft*, 156 Mont. at 371, 480 P.2d at 813. The second sentence of Article II, Section 16, was a response to that decision based on the delegates' intent that employees not be barred from third-party suits for injuries sustained during the course of their employment. The following minutes from the Constitutional Convention illustrate that point.

In his report to the Convention as a whole, Delegate Murray, representing the Bill of Rights Committee which drafted Section 16, gave the following explanation for the second sentence of that section:

Under Montana law, as announced in the recent decision of *Ashcraft versus Montana Power Company*, the employee has no redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen's Compensation law. The committee feels that this violates the spirit of the guarantee of a speedy remedy for all injuries of person, property or character. It is this specific denial, and this one only, that the committee intends to alter with the following additional wording: "No person shall be deprived of his full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation laws of this state." In other words, the committee wants to insure that the Workmen's Compensation laws of the state will be used for their original purpose--to provide compensation to injured workmen--rather than to deprive an injured worker of redress against negligent third parties, beyond his employer and fellow employees, because his immediate employer is covered by Workmen's Compensation.... To permit no remedy against third parties in cases where they [sic] employer is covered by Workmen's Compensation is to encourage persons with rundown premises to contract out work without improving the quality of the premises. The committee urges that this is an abuse of the Workmen's Compensation law and constitutes a misapplication of that law to protect persons who are negligent. The committee commends this provision to the Convention with the belief that it is an important, if technical, aspect of the administration of justice. Those are the remarks which are contained in the booklet. Let me amplify them by saying basically this: *we feel that the right to third-party action is a right which we should establish in our Constitution. It is a right which working men and women who are unfortunate enough to be injured have had for nearly 80 years in this state. We feel that it was wrongly taken away from these people by the Supreme Court decision which was mentioned. We feel that we perhaps are legislating in asking that this be written into our Constitution, but we of the committee really believe that we are acting in a judicial manner in asking that it be written in the Constitution for we feel that this Convention, perhaps, is the court of last resort for injured working men and women in Montana with respect to the third-party lawsuit, and we recommend that the section be adopted.*

Montana Constitutional Convention, Vol. V at 1754, March 8, 1972 (emphasis added).

The second sentence of Section 16 was extensively debated. Delegate Habedank moved that it be deleted. That motion was defeated by a vote of 76-14 (*Montana Constitutional Convention, Vol. V at 1759, March 8, 1972*), and Section 16 was

ultimately approved by a vote of 76-21 (Montana Constitutional Convention, Vol. VII at 2644, March 18, 1972).

...

We have considered the impact of Article II, Section 16, on numerous occasions and, without exception, have held that it precludes limitations on claims by injured employees against persons other than the employee's employer or fellow employee. See *Francetich v. State Comp. Mut. Ins. Fund* (1992), 252 Mont. 215, 827 P.2d 1279; *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 776 P.2d 488; *Webb v. Montana Masonry Constr. Co.* (1988), 233 Mont. 198, 761 P.2d 343; and *Hayes v. Aetna Fire Underwriters* (1980), 187 Mont. 148, 609 P.2d 257.

Trankel at 360-61, 938 P.2d at 621-22.

¶26 The discussion at the 1972 Constitutional Convention concerned itself, with the right of a claimant to recover from a negligent third-party **other than his or her employer**. Neither the discussion nor the language of the second sentence of Article II, section 16, guarantees a safety net for employees of uninsured employers.

¶27 An insurer receives a premium for providing workers' compensation insurance coverage. In writing coverage, it agrees that it will be subject to the *full legal redress* provision of Article II, section 16. In contrast, the State of Montana receives no premium. It is not required by the Constitution to provide a safety net. It is not required by the Constitution to pay benefits to injured workers employed by uninsured employers. Should no provisions have ever been made for UEF, Mrs. Thayer could not complain. Article II, section 16 is inapplicable to the UEF and section 39-71-511, MCA, is constitutional.

VI.

¶28 The UEF has paid Mrs. Thayer \$71,878.78. Assuming she recovered nothing from her deceased husband's employer, its potential, additional liability was \$74,301.22. She recovered \$100,000 from her husband's employer. That amount more than off-sets any remaining benefits that might be due her. The UEF properly terminated her benefits.

JUDGMENT

¶29 1. Section 39-71-511, MCA (1991) is not unconstitutional under Article II, section 16 of the 1972 Montana Constitution.

¶30 2. The Uninsured Employers' Fund properly terminated the petitioner's benefits pursuant to section 39-71-511, MCA (1991).

¶31 3. The petition in this matter is **dismissed with prejudice**.

¶32 4. This Decision and Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana this 28th day of October, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman L. Newhall

Mr. Kevin Braun

Submitted: April 6, 1998

ADDENDUM

ADDENDUM

UNCONTESTED FACTS

The parties stipulate and agree that the following facts are true:

- a. Gerald Thayer was an employee of Richard Smith. (Conclusions, WCC 9311-6942)
- b. Gerald Thayer was injured in the course and scope of his employment on October 15, 1992, when his clothes caught fire and he was burned. On October 31, 1992, Gerald Thayer died as a result of his injuries. (Conclusions, WCC No. 9311-6942)
- c. Phyllis Thayer is Gerald Thayer's widow. She is entitled to workers' compensation death benefits under Sections 39-71-704 and 39-71-721 M.C.A. (Conclusions, WCC No. 9311-6942)
- d. Richard Smith, the employer, was uninsured for the payment of workers' compensation benefits. (Conclusions, WCC No. 9311-6942)
- e. Benefits are payable to Phyllis Thayer, Gerald Thayer's widow, by the Uninsured Employer's Fund (UEF) to the extent provided by § 39-71-503 M.C.A. (Conclusions, WCC No. 9311-6942)
- f. Before his death, Gerald Thayer incurred reasonable costs for medical treatment of his burn injuries in the sum of \$253,207.98. (Pretrial Order, Agreed Facts, USDC Cause No. CV-93-054-GF-PGH)
- g. The UEF has paid \$85,000.00 to reimburse Montana Department of Public Health and Human Services for the costs of Gerald Thayer's medical treatment and Montana Department of Public Health and Human Services has released its lien.

h. UEF has paid death benefits (wage loss) to Petitioner at the rate of \$292.36 per week commencing October 22, 1992, through July 8, 1997 (245.8571 weeks x \$292.36 = \$71,878.78) when the benefits stopped.

i. Petitioner's maximum potential entitlement to death benefits (wage loss) per the Workers' Compensation Court judgment is 500 weeks x \$292.36/week = \$146,180.00, less the wage loss benefits already paid.

j. In 1993 and 1994, Petitioner commenced actions including an action in the United State District Court for the District of Montana, Great Falls Division, Cause No. CV-93-054-GF-PGH, against various defendants and alleging survival and wrongful death claims arising from injuries to and death of Gerald Thayer.

k. In said action, Petitioner alleged claims of negligence against Gerald Thayer's employer (Richard Smith) and Gerald Thayer's co-employee (Garry Thompson) and claims of negligence and strict product liability against the retail seller (Federal Sales Corporation, d/b/a Harris Warehouse and Canvas Sales) and the manufacturer (Midland Chicago Corporation) of CHEX liquid, a product which was being used by Gerald Thayer at the time of his injuries.

l. The damages sought by Petitioner in said action in the United States District Court were as follows:

Survival action.

Estimated future lost earnings during life expectancy = \$263,592.82.

Medical expenses of \$253,207.98 and funeral expenses of \$3,531.88.

Reasonable compensation for conscious mental and physical pain and suffering of Gerald L. Thayer between the time of injury and time of death: \$250,000.00.

Wrongful death action.

Reasonable damages for grief, sorrow and mental anguish of Phyllis Thayer and the heirs of Gerald Thayer and for their loss of the comfort, protection, society and companionship of Gerald L. Thayer = \$1,000,000.00.

Loss of services = \$85,734.78.

Loss of support = (See future lost earnings and loss of support above).

Prejudgment interest under § 27-1-210, MCA from June 7, 1993. (Pretrial Order, Relief Sought, USDC Cause #CV-93-054-GF-PGH, 2/5/97, p. 15)

- m. Richard Smith filed a Chapter 7 bankruptcy action on June 27, 1996, in the Western District of Wisconsin, Case No. 96-12594, in which Richard Smith discharged any personal liability to Petitioner in Cause No. CV-93-054-GF-PGH in the United States Court for the District of Montana, Great Falls Division.
- n. The insurance carrier for Richard Smith denied coverage for Richard Smith's liability for the reasons stated in a "Reservation of Rights" letter dated May 18, 1995.
- o. Prior to trial, the negligence claim of Petitioner against the employer, Richard Smith, was settled for the sum of \$100,000.00.
- p. Prior to trial, the negligence and product liability claims of Petitioner against Federal Sales Corporation were settled for the sum of \$130,000.00.
- q. The negligence claim against Midland Chicago Corporation was voluntarily dismissed by Petitioner prior to trial without any settlement consideration.
- r. Prior to trial and after dismissal of the negligence claim against Midland Chicago Corporation, the product liability claim of Petitioner against Midland Chicago Corporation was settled for the sum of \$75,000.00.
- s. On June 16, 1997, in said Cause No. CV-93-054-GF-PGH, the remaining negligence claim against Garry Thompson proceeded to trial before a six person jury.
- t. On June 19, 1997, the jury returned a Special Verdict in which it found that the negligence of Garry Thompson was a cause of the injuries sustained by Gerald Thayer; that the negligence of Gerald Thayer was a cause of the injuries sustained by Gerald Thayer; that the percentage of fault attributable to Garry Thompson was 55%; that the percentage of fault attributable to Gerald Thayer was 45%; and that the total amount of damages that would reasonably compensate Petitioner was \$500,000.00.
- u. On July 8, 1997, the United States District Court entered judgment on the verdict.
- v. On November 12, 1997, and pursuant to Plaintiff's Motion For New Trial, the United States District Court affirmed the jury's apportionment of negligence, but granted Plaintiff's Motion for New Trial on the issue of damages. (Memorandum and Order, USDC CV-93-054-GF, 11/12/97)
- u. December 10, 1997, the negligence claim of Petitioner against the co-employee, Garry Thompson, was settled for the sum of \$100,000.00.
- x. On June 25, 1997, the UEF advised Petitioner that by reason of her receipt of third party settlements and pursuant to § 39-71-511 M.C.A., Petitioner is not entitled to

receive further benefits from the Uninsured Employer's fund and further advised that such benefits "will be terminated fourteen days from the date of this letter."

y. Under the terms of the settlements with Richard Smith, Federal Sales Corporation, Midland Chicago Corporation, and Garry Thompson, the settlement monies were paid in compromise of disputed claims, and were not to be construed as an admission of liability.

z. From the settlements received from Richard Smith, Federal Sales Corporation, Midland Chicago Corporation, and Garry Thompson, Petitioner has paid attorneys fees of \$135,000 and had paid costs in pursuing her cause of action against the several defendants before the United States District Court totalling \$37,718.34 through July 10, 1997.

aa. On June 26, 1997, the day after the UEF issued its 14 day Notice of Termination of Benefits, Petitioner filed a Petition for Mediation.

bb. The mediator's Mediation Report and Recommendation was issued on August 28, 1997.

1. The facts set forth in this paragraph and the paragraphs that follow in this section are taken from an extensive set of uncontested facts the parties set forth in their Pretrial Order. The statement of uncontested facts is set forth verbatim in the Addendum to this decision.
2. Gerald Thayer initially survived his burns. He was burned on October 15, 1992. He died 16 days later on October 31, 1992.
3. Presumably the DPHHS payments were made under the Medicaid program.
4. The maximum number of weeks benefits are payable to a widow is 500. § 39-71-721(5), MCA (1991).
5. The issues are taken verbatim from the Pretrial Order.
6. Section 39-71-504, MCA, authorizes the collection of a penalty from uninsured employers, as well as recoupment from the uninsured employer of benefits paid by the UEF.