IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 17

WCC No. 9810-8075

ROBERT O. WASHINGTON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HAROLD CHRISTELEIT

Employer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Summary: Claimant disabled from serious injuries suffered during electrocution asked the WCC to set aside a subrogation determination made by the Department of Labor and Industry in 1977. Insurer moved for partial summary judgment on that issue.

Held: Claimant's request that the WCC set aside the 1977 earlier is dismissed. While section 39-71-204, MCA (1997) gives the Department continuing jurisdiction to rescind the 1977 Order, the WCC does not have jurisdiction to rescind that Order where it was not an Order of the WCC.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2909, MCA (1997). While section 39-71-2909, MCA (1997) gives the WCC authority to review and change benefits previously awarded by the WCC, the WCC does not have jurisdiction to set aside a subrogation order entered by the Division of Workers' Compensation in 1977, although section 39-71-204, MCA (1997) gives the Department of Labor and Industry continuing jurisdiction to do so.

Benefits: Change in Condition. While section 39-71-2909, MCA (1997) gives the WCC authority to review and change benefits previously awarded by the WCC, the WCC does not have jurisdiction to set aside a subrogation order entered by the Division of Workers' Compensation in 1977, although section 39-71-204, MCA (1997) gives the Department of Labor and Industry continuing jurisdiction to do so.

Jurisdiction: Original Jurisdiction. While section 39-71-2909, MCA (1997) gives the WCC authority to review and change benefits previously awarded by the WCC, the WCC does not have jurisdiction to set aside a subrogation order entered by the Division of Workers' Compensation in 1977, although section 39-71-204, MCA (1997) gives the Department of Labor and Industry continuing jurisdiction to do so. Subrogation. While section 39-71-2909, MCA (1997) gives the WCC authority to review and change benefits previously awarded by the WCC, the WCC does not have jurisdiction to set aside a subrogation order entered by the Division of Workers' Compensation in 1977, although section 39-71-204, MCA (1997) gives the Department of Labor and Industry continuing jurisdiction to do so.

Subrogation. While section 39-71-2909, MCA (1997) gives the WCC authority to review and change benefits previously awarded by the WCC, the WCC does not have jurisdiction to set aside a subrogation order entered by the Division of Workers' Compensation in 1977, although section 39-71-204, MCA (1997) gives the Department of Labor and Industry continuing jurisdiction to do so.

¶1 The petitioner (claimant) asks the Court to set aside a subrogation determination made by the Department of Labor and Industry (Department) in 1977 and to adjust his compensation rate upward to reflect termination of auxiliary social security disability benefits. Respondent (State Fund) moves for partial summary judgment with respect to the subrogation request.

Factual Background

¶2 As required by Rule 24.5.329(3) of this Court, the parties have set forth statements of uncontested facts in their respective briefs. Neither party disputes the facts set out by the other, therefore all facts they have set forth are deemed true for purposes of the present motion.

¶3 It is unnecessary to recite all the agreed facts. The critical facts, in summary form, are as follows:

1. On May 28, 1975, the claimant was injured at work when he was shocked by a 14,400 volt electrical line. The high-voltage current entered through claimant's right arm and exited through his feet.

2. Claimant suffered serious injuries. He was hospitalized from May 29, 1995 to August 9, 1975. His right (dominant) arm was amputated just below the elbow. Toes on his left foot were amputated. His right foot underwent skin grafting.

3. The State Fund insured claimant's employer. It accepted liability for his accident and has paid medical and compensation benefits.

4. On June 11, 1975, the claimant filed an action for damages against the driver of the truck which was involved in the accident and the driver's employer. The third-party action was tried to a jury commencing on or about September 17, 1976. On September 23, 1976, the jury awarded claimant the sum of $623,367. In arriving at its verdict, the jury rejected a claim of contributory negligence on the part of claimant.

5. The judgment was thereafter satisfied.

6. Subsequent to trial, on June 26, 1977, and as a result of his industrial injury, claimant's right leg was amputated below the knee. On September 19, 1977, the claimant's left foot was amputated.

7. On September 26, 1977, the Division of Workers' Compensation (Division) entered an Order finding that the State Fund was entitled to a subrogation interest in the claimant's third-party recovery. The Order provided for the claimant to repay the State Fund the sum of $30,492.72 with respect to prior benefits paid by the State Fund and for the State Fund to reduce future medical and compensation benefits paid to claimant to 34.15% of the benefits otherwise owed until such time as the total future payments equaled $141,926.98, at which time the State Fund is then required to pay full benefits without any offset for subrogation.

8. The Division Order further provided :

Either party may contest this Order within twenty days of its receipt. If neither party contests the Order, the Order shall be considered final.

9. A copy of the Order is attached to the Response to Petition for Trial as Exhibit A.

10. Claimant did not contest the Order within the 20 days provided, indeed he has never appealed the Order.

11. At the time the Order was issued, the claimant was still recovering from the amputation of his right leg and was in the hospital recuperating from the amputation of his left foot. In his statement of uncontested facts, the claimant says that at the time of the Order he "was in no condition to contest it" (the Order). (Petitioner's Answer Brief to Respondent's Motion for Summary Judgment at 4.) That statement is not controverted by the State Fund and is accepted as fact.

12. Following the amputation of his right leg and left foot, claimant turned to alcohol to escape from the reality of what his life had become. (Petitioner's Answer Brief to Respondent's Motion for Summary Judgment, Uncontested Fact 14 at 4.) He ceased drinking a year ago. (*Id.*)

Discussion

¶4 The subrogation Order at issue in this case was entered by the Division. In 1989 the Division was dissolved and its duties transferred to the Department. § 64, ch. 613, 1989 Mont. Laws. Since 1975 the Legislature has adopted other amendments to the Workers' Compensation Act which affect the dispute resolution process. The changes in the law complicate the resolution of the issues in this case.

¶5 In its Motion for Partial Summary Judgment the State Fund argues several grounds for dismissing claimant's request to set aside the 1977 Division Order. First, it argues that the request is barred by the statute of limitations. Second, it asserts that even if not barred by a statute of limitations the request is barred by the equitable doctrine of *laches*. Third, it argues that claimant is collaterally estopped from contesting the adequacy of the amount of the damages he recovered in his third-party action.

¶6 One issue not specifically raised in the State Fund's motion concerns the jurisdiction of the Workers' Compensation Court to set aside the subrogation Order. Whether the Court has subject matter jurisdiction may be raised at any time and may be raised by the Court *sua sponte* (on its own motion). *In re Marriage of Miller,* 259 Mont. 424, 426, 856 P.2d 1378, 1380 (1993). In oral argument held in Billings on February 2, 1999, the issue was raised. Since subject matter jurisdiction is a prerequisite to the Court's adjudication of the other issues, it must be addressed first.

I. The 1977 Order

¶7 At the time of the claimant's injury, subrogation was governed by R.C.M. 92-204.1, which was enacted in 1973 as a new section. §1, ch. 493, 1973 Mont. Laws. The section provided for a right of subrogation and for enforcement of that right. The last sentence of the paragraph gave the Division the authority to finally determine the amount due an insurer, providing:

> In the event that the amount of compensation and benefits payable under this act shall not have been fully determined at the time such employee or his heirs or personal representative, or the employer or insurer, shall receive settlement of his action, prosecuted as aforesaid, then the division shall determine what proportion of such settlement shall be allocated under subrogation and such determination may be appealed as any other determination of the division.

At the time the section was enacted the Workers' Compensation Court had not been established. Thus, any appeal from the Division Order was to district court in accordance with the Montana Administrative Procedure Act (MAPA).

¶8 In 1977 the Legislature amended R.C.M 92-204.1, splitting it into two sections designated as R.C.M. 92-204.1 and 92-204.2 (1977). §§ 2 and 3, ch. 550, 1977 Montana

Laws. In doing so, the Legislature also provided that an appeal of a subrogation order was to the Workers' Compensation Court. Subsection (5) of 92-204.2 (1977) 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 [third-party] 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 amendment was effective July 1, 1977. R.C.M. 43-507 (1975). Since it concerned a matter of procedure -- the forum for adjudication, the Division's subrogation Order, which was entered subsequent to the effective date of the amendment, was appealable to the Workers' Compensation Court. *Haugen v. Blaine Bank of Montana,* 279 Mont. 1, 8-9, 926 P.2d 1364, 1368 (1996) (" [W]here a statute is procedural, rather than substantive . . . the statue in question will be applied to a cause of action arising before its enactment.").

¶9 The 1977 amendment did not provide any time limit for filing an appeal from a subrogation order. No other provision of the 1977 Workers' Compensation Act, or the 1975 and 1973 versions of the Act, provided a time limit for an appeal of the order and the same is true today.

¶10 However, at the time of claimant's industrial accident, at the time of the Division's Order, and presently, MAPA provides a 30-day period in which to seek judicial review of an agency decision. R.C.M. 82-4216 (1973-77) (recodified as section 2-4-702, MCA). The 30-day limitation was part of a section which provided for, and still provides for, judicial review of any final decision of a state agency in a contested case proceeding. In *Ranger Ins. Co. v. Bates*, WCC No. 9709-7821, Order Granting Motion to Strike Cross Appeal (December 30, 1997), I held that absent a specific time limitation under the Workers' Compensation Act the general 30-day time limitation applies to applications for judicial review by [appeals to] the Workers' Compensation Court. *Compare with Carbon County School District Trustees v. Spivey,* 247 Mont. 33, 805 P.2d 61 (1991) (longer, specific statute governing judicial review of a decision of the Superintendent of Public Instruction terminating a tenured teacher supercedes more general limitation under MAPA in the absence of clear legislative intent to repeal the specific limitation). Any contention that the MAPA time limit for appeals does not apply to the Workers' Compensation Act is negated by a specific provision in the Workers' Compensation Act stating that appropriate provisions of MAPA apply to the Court. That provision was in effect at the time of the Division's Order, R.C.M. 92-852(1) (1977), and is still in effect, § 39-71-2903, MCA (1997).

¶11 In this case, no appeal was ever taken from the Division's 1977 Order and the time for doing so has long past. Therefore, the Division's Order is final and binding on both claimant and the State Fund.

II. Jurisdiction to Alter the 1977 Order

¶12 Claimant's request that the Court set aside the 1977 Order requires the Court to determine if it has the authority or jurisdiction to do so.

¶13 At the time the 1977 Order was entered, the Workers' Compensation Act authorized the Department to rescind or amend its prior orders. R.C.M. 92-826 (1977), provided:

> The division shall have continuing jurisdiction over all its orders, decisions, and awards, and may, **at any time**, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it **upon good cause appearing therefor.** . . . Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award, shall have the same effect as original orders or awards. [Emphasis added.]

As noted earlier, the Division was dissolved in 1989 and its powers transferred to the Department. The Division's power to rescind prior orders was thereby transferred to the Department.

¶14 Section 39-71-204, MCA (1997), the current statute governing the reopening of prior orders of the Division and Department, provides:

> **39-71-204. Rescission, alteration, or amendment by department of its orders, decisions, or awards -- effect -- appeal.** (1) The department has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it upon good cause appearing therefor.
>
> (2) Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award has the same effect as original orders or awards.
>
> (3) If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge.

Under this section, it is plain that the Department may consider the claimant's request to rescind the 1977 Order. But he is not asking the Department to do so, he is asking the Court.

¶15 At the time the Division issued its 1977 Order, the authority of the Court to reconsider prior awards was set out in R.C.M. 92-848 (4), which provided in relevant part:

> (4) The judge has continuing jurisdiction **of cases in which a petition under subsection (1)** of this section has been filed, and may, upon the application of any party, review, diminish, or increase in accordance with the law on benefits . . . any

> benefits awarded . . . . **upon the grounds that the disability of the person has changed.** [Emphasis added.]

On its face, this provision, even if presently applicable, does not authorize the Court to rescind the Division's Order. The jurisdiction conferred is only with respect to orders and judgments previously issued by the Court.

¶16 The Court's current authority to review prior orders and awards is governed by section 39-71-2909, MCA (1997), which provides:

> **39-71-2909. Authority to review, diminish, or increase awards.** The judge may, upon the petition of a claimant or an insurer that the disability of the claimant has changed or that the claimant received benefits through fraud or deception, review, diminish, or increase, in accordance with the law on benefits as set forth in chapter 71 of this title, **any benefits previously awarded by the judge**. An insurer's petition alleging that the claimant received benefits through fraud or deception must be filed within 2 years after the insurer discovers the fraud or deception. [Emphasis added.]

On its face, the current section only applies to prior awards by the Court. It does not apply to orders by the Department or its predecessor (the Division).

¶17 While it may be argued that the grant of general jurisdiction to the Court to adjudicate disputes involving benefits, § 39-71-2905, MCA (1997), applies to subrogation disputes, section 39-71-2909, MCA, specifically addresses reopening of prior orders. As the more specific statute, it, rather than the general jurisdictional provision, is controlling. § 1-2-102, MCA (1997) ("When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."); *Gibson v. State Compensation Mut. Ins. Fund,* 255 Mont. 393, 396, 842 P.2d 338, 340 (1992).

¶18 The Court therefore lacks jurisdiction to rescind or reopen the Division's 1977 subrogation Order. Jurisdiction to consider claimant's request lies with the Department. This Court's jurisdiction is limited to judicial review of any decision the Department makes.

¶19 Lacking jurisdiction over the claimant's request that the 1977 Order be rescinded, this Court cannot consider the State Fund's substantive challenges to the request. Those challenges must be considered in the first instance by the Department.

ORDER

¶20 For the reasons set forth in the previous discussion, IT IS HEREBY ORDERED that claimant's request that the September 26, 1977 Order of the Division of Workers' Compensation be rescinded or set aside is **dismissed**.

¶21 This partial summary judgment is **NOT** certified as final for purposes of appeal.

DATED in Helena, Montana, this 12th day of February, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Greg E. Overturf
Date Submitted: February 2, 1999