IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 39

WCC No. 9905-8227

STATE COMPENSATION INSURANCE FUND

Petitioner/Insurer

HARVEY VAN DYKEN & SONS

Employer

vs.

MARTIN J. DOUMA

Respondent/Claimant.

ORDER DISMISSING PETITION FOR FAILURE TO MEDIATE

Summary: Insurer filed petition to determine its subrogation interest in third-party actions arising out of claimant's industrial accident. Claimant urged that mediation was required. Mediation was not held because the insurer took the position mediation was not required on a subrogation claim arising from a 1994 injury.

Held: Petition dismissed because mediation was required. Contrary to insurer's argument, following 1991 amendments to section 39-71-414(5), MCA, the WCC, not the Department of Labor, had jurisdiction to adjudicate subrogation issues. Since the WCC had jurisdiction over the subrogation issue ab initio, the mediation provisions applicable to the WCC on the date of the injury also apply. See, §39-71-2401(1), MCA (1993)

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-414(5), MCA.** Petition filed by insurer to adjudicate subrogation interests was dismissed because mediation had not been conducted. Contrary to insurer's argument, following 1991 amendments to section 39-71-414(5), MCA, the WCC, not the Department of Labor, had jurisdiction to adjudicate subrogation issues. Since the WCC had jurisdiction over the subrogation issue ab initio, the mediation provisions applicable to the WCC on the date of the injury also apply. See, §39-71-2401(1), MCA (1993).

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2401(1), MCA (1993). Petition filed by insurer to adjudicate subrogation interests was dismissed because mediation had not been conducted. Contrary to insurer's argument, following 1991 amendments to section 39-71-414(5), MCA, the WCC, not the Department of Labor, had jurisdiction to adjudicate subrogation issues. Since the WCC had jurisdiction over the subrogation issue ab initio, the mediation provisions applicable to the WCC on the date of the injury also apply. See, §39-71-2401(1), MCA (1993).

Jurisdiction: Mediation. Petition filed by insurer to adjudicate subrogation interests was dismissed because mediation had not been conducted. Contrary to insurer's argument, following 1991 amendments to section 39-71-414(5), MCA, the WCC, not the Department of Labor, had jurisdiction to adjudicate subrogation issues. Since the WCC had jurisdiction over the subrogation issue ab initio, the mediation provisions applicable to the WCC on the date of the injury also apply. See, §39-71-2401(1), MCA (1993).

Mediation. Petition filed by insurer to adjudicate subrogation interests was dismissed because mediation had not been conducted. Contrary to insurer's argument, following 1991 amendments to section 39-71-414(5), MCA, the WCC, not the Department of Labor, had jurisdiction to adjudicate subrogation issues. Since the WCC had jurisdiction over the subrogation issue ab initio, the mediation provisions applicable to the WCC on the date of the injury also apply. See, §39-71-2401(1), MCA (1993).

¶ This case involves a petition by the State Compensation Insurance Fund (State Fund) to determine its subrogation interest in third-party actions arising out of claimant's August 24, 1994 industrial accident. The petition indicated that the matter had not been mediated. The Court ordered the parties to file legal memoranda as to whether mediation is required. Both parties have now responded.

¶ Claimant urges that mediation is required and that the petition should therefore be dismissed. The State Fund counters that at the time of the claimant's industrial accident, the Department of Labor and Industry (DLI) had jurisdiction over subrogation disputes and that no mediation was or is required. It cites ARM 24.29.207(1), section 39-71- 2401, MCA, and *Carmichael v. Workers' Compensation Court,* 234 Mont. 410, 763 P.2d 1122 (1988), as authority.

¶ The State Fund is incorrect in asserting that at the time of the claimant's injury the Workers' Compensation Act vested jurisdiction over subrogation disputes in the DLI. Prior to 1991, section 39-71-414(5), MCA, 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 department shall determine what proportion of the settlement shall be allocated under subrogation**. The department's determination may be **appealed** to the workers' compensation judge. [Emphasis added.]

However, in 1991 the section was amended to remove the reference to the DLI. In *Harry A. Ness v. Anaconda Minerals Company*, WCC No. 8906-5395, Order and Final Judgment (December 29, 1995), I considered the effect of the amendment, holding that it passed jurisdiction over subrogation matters "to the Workers' Compensation Court under its general jurisdiction to adjudicate issues concerning benefits." *Id.* at 5. The amendment was in effect in 1994, thus the Court, not the DLI, had jurisdiction over the dispute at the time of the injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Even if the ARM provision cited by the State Fund purports to authorize the DLI to adjudicate subrogation disputes,[(1)] the provision must recede to the statutes:

> Whatever force and effect the regulation has must derive from the statute under which it is enacted, and a regulation in conflict with that statute is without effect. See, 2 Am.Jur.2d *Administrative Law* §289, and *Bell v. Dept. of Licensing* (1979), Mont., 594 P.2d 331, 36 St.Rep. 880. "It is axiomatic that a statute cannot be changed by administrative regulation." *State ex rel. Swart v. Casne* (1977), 172 Mont. 302, 308, 564 P.2d 983, 986.

Michels v. Department of Social and Rehabilitation Services, 187 Mont. 173, 177-78, 609 P.2d 271, 273 (1980).

¶ Since the Court had jurisdiction over the subrogation issue *ab initio*, the mediation provisions applicable to the Court on the date of the injury also apply. Section 39-71-2401(1), MCA (1993), provides:

> **39-71-2401. Disputes -- jurisdiction -- settlement requirements -- mediation.** (1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.
>
> (2) A dispute arising under this chapter that does not concern benefits or a dispute for which a specific provision of this chapter gives the department jurisdiction must be brought before the department.

Since subrogation affects benefits by reducing future benefits or allowing the insurer to recoup part of previously paid benefits, subsection (1) not subsection (2) applies. Thus, at the time of claimant's 1994 injury, the parties were required to mediate any subrogation dispute. *Carmichael*, which concerns **retroactive** application of a mediation requirement, is inapposite.

¶ The State Fund concedes that the subrogation dispute raised in its petition has not in fact been mediated. Since subrogation is a prerequisite to the filing of the petition, the petition is premature and must be **dismissed without prejudice**.

SO ORDERED.

DATED in Helena, Montana, this 29th day of June, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. William J. Mattix
Mr. Michael D. Cok
Date Submitted: June 23, 1999

1. State Fund cites ARM 24.29.207(1) as authority for its contention that the Department had jurisdiction over subrogation claims prior to the enactment of HB 592 by the 1999 legislature. The cited provision provides:

> Parties having a dispute involving legal rights, duties or privileges, other than disputes over benefits available directly to a claimant under Title 39, chapters 71 and 72, MCA, must bring the dispute to the department for a contested case hearing.
>
> Whether the provision contemplates subrogation matters is questionable. Subrogation affects the claimant's benefits, permitting the insurer to reduce future benefits or recoup benefits already paid.