

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 59

WCC No. 9706-7768

STEPHEN T. GARCIA

Petitioner

vs.

**DEPARTMENT OF LABOR & INDUSTRY
EMPLOYMENT RELATIONS DIVISION/
UNINSURED EMPLOYERS' FUND**

Respondent/Insurer for

JULIE MANIACI

Employer.

ORDER ON APPEAL

Summary: Allegedly uninsured employer and workers' compensation claimant entered into settlement agreement, but the Department of Labor and Industry, whose approval of the settlement agreement is required by section 39-71-519, MCA (1995), refused to give approval because the Uninsured Employers' Fund was not a party to the agreement. This appeal followed. After the appeal was filed, the claimant, Julie Maniaci, repudiated the settlement agreement, interjecting the issue whether the appeal had become moot.

Held: Claimant's purported repudiation of the settlement agreement does not moot the appeal because the settlement agreement became binding on claimant when executed, with the Department's approval merely an express contingency on performance. Because the Department's failure to approve the agreement is appealable to this Court, see *Ingraham v. Champion Int'l*, 243 Mont 42, 793 P.2d 769 (1990), the right to appeal existed at the time the agreement was executed and is part of the agreement. Until the appeal is resolved, claimant is bound by the agreement and cannot repudiate. As for the underlying issue, the Court holds the Department erred by disapproving the agreement because the UEF was not a party. Section 39-71-519, MCA (1995), which governs the settlement, expressly allows settlement by "any" of the enumerated parties. (Note: see order dated 11/7/97 amending this decision with regard to whether the UEF is an insurer, but not changing the holdings herein.)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

section 39-71-519, MCA (1995). Because section 39-71-519, MCA (1995) expressly allows settlement among "any" of the parties enumerated in the statute, the Department of Labor could not disapprove a settlement between a claimant and an allegedly uninsured employer on the ground the Uninsured Employers' Fund was not a party to the agreement.

Settlements: Generally. Because section 39-71-519, MCA (1995) expressly allows settlement among "any" of the parties enumerated in the statute, the Department of Labor could not disapprove a settlement between a claimant and an allegedly uninsured employer on the ground the Uninsured Employers' Fund was not a party to the agreement.

Settlements: Generally. Claimant and allegedly uninsured employer entered into a settlement agreement, which was disapproved by the Department of Labor on the ground the Uninsured Employers' Fund was not a party. While the propriety of that disapproval was on appeal to the Workers' Compensation Court, claimant purported to repudiate the settlement agreement and argued the appeal was moot. The WCC held claimant's attempt to repudiate the settlement agreement did not moot the appeal because the agreement became binding on claimant when executed, with the Department's approval merely an express contingency on performance. Because the Department's failure to approve the agreement was appealable to this Court, see *Ingraham v. Champion Int'l*, 243 Mont 42, 793 P.2d 769 (1990), the right to appeal existed at the time the agreement was executed and was part of the agreement. Until the appeal is resolved, claimant is bound by the agreement and cannot repudiate.

Uninsured Employers' Fund: Generally. Because section 39-71-519, MCA (1995) expressly allows settlement among "any" of the parties enumerated in the statute, the Department of Labor could not disapprove a settlement between a claimant and an allegedly uninsured employer on the ground the UEF was not a party to the agreement.

Stephen T. Garcia (Garcia) has two pending cases before this Court, both arising out of an alleged injury suffered by Julie Maniaci⁽¹⁾ (Maniaci) on November 10, 1996. Maniaci was employed by Garcia, who had no workers' compensation coverage at the time of the alleged injury. According to the various pleadings and documents in the Court files, Maniaci submitted a claim to the Uninsured Employers' Fund (UEF), which accepted liability for her injury.

As noted, there are two pieces to this litigation. The first is a petition filed by Garcia against Maniaci on June 29, 1996, in which Garcia requests the Court to "[d]isallow" Maniaci's claim and "[e]liminate the judgment against my firm to compensate Julie [Maniaci] for wages and health care." (Petition for Hearing in WCC No. 9607-7579.) The second, which is the subject of this Order, is a June 18, 1997 appeal from the refusal of the Department of Labor and Industry (Department) to approve the settlement petition executed between Garcia and Maniaci. The appeal has been fully briefed and ready for decision.

Factual Background for Appeal

The appeal arises out of a settlement agreement reached between the parties while the first petition was pending. On May 15, 1997, Garcia and Maniaci executed a petition for full and final compromise settlement on a disputed liability basis and submitted it to the Department for approval. A copy of the petition is attached to the Notice of Appeal as Exhibit A(2).

The petition states that Garcia "has disputed any liability for the claim" made by Maniaci. It then provides that Garcia shall pay claimant \$7,000 "in a proposed full and final compromise settlement of all claims provided by or referenced in the Montana Workers' Compensation Act" and that Maniaci,

in signing and submitting this petition to the Department of Labor and Industry, further understands that the above named employer [Garcia] is forever released from payment of compensation or damages pursuant to any and all remedies in the workers' compensation court or district court as provided for or referenced in the Montana Workers [sic] Compensation Act for injuries claimed to have been suffered as indicated above.

Finally, the agreement provides:

The claimant hereby petitions the Department, with the concurrence of the above named employer, for approval of this petition and that the claim be fully and finally closed based on the agreement set forth above. If the petition is approved, the claim will be forever closed and can never be reopened.

At the time of the settlement agreement, Maniaci was represented by an attorney. That representation appears from the Employment Relations Division Settlement/advance Recap Sheet which is attached to the petition as Exhibit A(3) and from Maniaci's correspondence with the Court.

On June 9, 1997, the Department rejected the settlement. (Order Denying a Full and Final Compromise Settlement.) The denial was based on the fact that the UEF was not a party to the settlement:

IT IS THEREFORE ORDERED the petition be denied based on the information that insurer, Uninsured Employers Fund and claimant have not reached an agreement. The Department considers Uninsured Employers Fund an insurer. [Sic.]

(Notice of Appeal, Exhibit A(1).)

This appeal followed. On July 16, 1997, the Court received and filed Petitioner's Initial Brief in Support of Notice of Appeal setting forth the issues for the Court to determine as:

- 1) May ERD reject a settlement of all rights and remedies made pursuant to 39-71-519, MCA, because no "insurer" has consented?
- 2) Is the UEF an "insurer" within the meaning of the Act?

On July 21, 1997, Maniaci wrote the Court stating that her "position is the same as that of the UEF which is represented by Bob Campbell." On July 22, 1997, she wrote a second letter to the Court in which she states:

1. I, hereby, stated [sic] that I would like to withdraw/or allowed to be dismissed from the settlement.

Reason: My attending physician, Dr. Kurtz, stated when I called him during the settlement conference, that it was not the right time to settle my case. He said I was not at MMI, at that time.

2. I am no longer in agreement with a settlement and not interested in a settlement.

Maniaci has otherwise not responded to the appeal.

On August 18, 1997, the UEF filed a responsive brief. (Department of Labor and Industry Answer Brief to Appeal Brief.) On August 25, 1997, Garcia filed a reply brief. (Petitioner's Reply Brief in Support of Notice of Appeal.) With the filing of the reply brief, the appeal was deemed submitted for decision.

Discussion

1. Applicable Statutes.

Maniaci's alleged industrial accident occurred on November 10, 1995, therefore, the 1995 version of the Workers' Compensation Act governs this case. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

There are two provisions of the Act which are implicated in this appeal. The first is subsection (1) of section 39-71-741, MCA (1995), which applies to settlements on a disputed liability basis. The subsection reads:

39-71-741. Compromise settlements and lump-sum payments. (1) (a) Benefits under this chapter may be converted in whole or in part to a lump sum:

(i) if a claimant and an insurer dispute the initial compensability of an injury; and

(ii) if the claimant and insurer agree to a settlement.

(b) The agreement is subject to department approval. The department may disapprove an agreement under this section only if there is not a reasonable dispute over compensability.

(c) Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department.

The second is section 39-71-519, MCA (1995), which governs settlements by uninsured employers. That section reads:

39-71-519. Settlement. The department, the uninsured employer, the injured employee or his beneficiaries, 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 may enter into a settlement agreement to finally settle the rights and liabilities under 39-71-501 through 39-71-511 and 39-71-515 through 39-71-519 of any or all of the parties. Such a settlement is subject to department approval in accordance with 39-71-741.

2. The Effect of Claimant's Repudiation of the Settlement Agreement.

As an initial matter, the Court must determine whether the appeal is moot in light of Maniaci's attempt to withdraw from the agreement. Resolution of that matter involves the statutes quoted above and contract law.

Settlement agreements are contracts and must be construed and enforced as such. *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996). Where the parties reach an express, complete, and unconditional settlement agreement, the agreement is enforceable. *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 399, 849 P.2d 1039, 1042 (1993).

The agreement in this case was expressly contingent upon the approval of the Department. Moreover, the statutory requirements for Department approval were part of the agreement. "The laws which subsists [sic] at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Valier Co. v. State*, 123 Mont. 329, 341, 215 P.2d 966, 973 (1950) (quoting from *United States ex rel. Von Hoffman v. Quincy*, 4 Wall. 535, 18 L.Ed. 403, 408.) Thus, under both section 39-71-519, MCA, and 39-71-741, MCA, the agreement was ineffective without Department approval.

However, except for the approval of the Department, the agreement executed by Maniaci and Garcia is unconditional. The parties agreed to all terms of the settlement and to submit the agreement to the Department for its approval. The Department's approval amounted to

a condition precedent to the enforcement of the agreement. "A condition precedent is a condition which must be met before the agreement becomes effective." *Depee v. First Citizen's Bank of Butte*, 258 Mont. 217, 220, 852 P.2d 592, 593. (1993). The settlement agreement constitutes a contract between Garcia and Maniaci. Upon Department approval, the agreement is enforceable.

Although the Department did not approve the agreement, its failure to do so is appealable to this Court. *Ingraham v. Champion Int'l*, 243 Mont. 42, 793 P.2d. 769 (1990). That right to appeal existed at the time the settlement petition was executed and is therefore a part of the settlement agreement. *Valier Co.* at 341, 215 P.2d at 973. Thus, under the agreement Garcia is entitled to judicial review of the Department's disapproval of the agreement. Maniaci is bound by the agreement and may not unilaterally repudiate it.

3. The UEF as Insurer.

Garcia argues that the Department erred in determining that the UEF is a necessary party to the proffered settlement. The Court agrees.

Section 39-71-519, MCA (1995), provides:

39-71-519. Settlement. The department, the uninsured employer, the injured employee or his beneficiaries, 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 may enter into a settlement agreement to finally settle the rights and liabilities under 39-71-501 through 39-71-511 and 39-71-515 through 39-71-519 **of any or all of the parties.** Such a settlement is subject to department approval in accordance with 39-71-741. [Emphasis added.]

Even if the UEF is deemed to be the "department" within the meaning of the section, the section is in the disjunctive. On its face it permits "any" of the enumerated parties to settle between or among themselves. It does not require that all of the enumerated parties embrace the settlement.

The Department argues that notwithstanding section 39-71-519, MCA, the UEF is a necessary party to any settlement because it is an "insurer" and any settlement approved under section 39-71-74, MCA, must be between the claimant and the "insurer". If that were true, then an uninsured employer and claimant could not settle their dispute without the UEF's approval, thus nullifying the plain language of section 39-71-419, MCA.

Statutes must be construed together and harmonized if possible. *Lake v. Lake County*, 233 Mont. 126, 132, 759 P.2d 161, 165 (1988). A statute must be construed as a whole to give effect to all of its provisions whenever wherever possible. *Taylor v. Matejovski*, 261 Mont. 514, 520, 863 P.2d 1022, 1026 (1993). Sections 39-71-519 and 39-71-741 are reconcilable. While section 39-71-741, MCA, concerns itself with settlement agreements between a

claimant and insurer, section 39-71-519, MCA, by its express terms expands the Department's review to agreements involving uninsured employers.

Even if the sections were construed to require the consent of an insurer to a settlement reached under section 39-71-519, MCA, the UEF is not an insurer. "Insurer" is defined in section 39-71-116(13), MCA (1995), as follows:

(13) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

Plan 1 governs self-insured employers. § 39-71-2101, MCA (1995). Plan 2 pertains to insurance companies writing coverage in Montana. § 39-71-2201, MCA (1995). Plan 3 pertains to the State Compensation Fund. § 39-71-2311, MCA (1995).

The Department acknowledges that "the Uninsured Employers' Fund is not defined as an "insurer" within Section 39-71-116(13), MCA," however, it argues that unless the Court nonetheless deems it an insurer for purposes of section 39-71-741, MCA, then the enforceability of provisions pertaining to uninsured employers "would be in serious question." (Department of Labor and Industry Answer Brief to Appeal Brief at 3.) The short answer to its contention is that courts cannot amend statutes. *Russette v. Chippewa Cree Hous. Auth.* 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). The longer answer is just as straight forward: The settlement agreement binds only the parties to the agreement and does not affect the right of the UEF to seek reimbursement for benefits it has paid or seek the penalties specified by statute. §§ 39-71-504 and -506, MCA (1995).⁽²⁾

I therefore conclude that the Department erred when it concluded it could not approve the settlement because the UEF was not a party to it.

4. Remedy.

Garcia asks the Court to direct the Department to approve the settlement petition. (Petitioner's Initial Brief in Support of Notice of Appeal at 5.) Garcia asks too much. Section 39-71-741(1), MCA (1995), provides that the Department may disapprove a disputed liability settlement if there is no reasonable dispute over liability. The Department did reach or address that issue. It must therefore be allowed to do so.

5. Addendum.

On October 22, 1997, Garcia's attorney contacted the Court's hearing examiner by telephone and told her that Garcia now wishes to withdraw his appeal and no longer wishes to be bound by the settlement agreement. At the time of the call, this decision had already been drafted and was being edited and proofed. Today, October 23, 1997, the Court received a Withdrawal of Notice of Appeal from Decision of Department of Labor and Industry. This matter was submitted for decision two months ago. It has been decided and

the withdrawal was too late. The decision, however, does not preclude Garcia and Maniaci from entering into agreement to rescind their settlement.

ORDER

1. The Department's disapproval of the Petition for Full and Final Compromise Settlement is **reversed**.

2. Since the Department did not consider whether there is a reasonable dispute over liability, this matter is **remanded** to the Department for such determination. § 39-71-741(1)(b), MCA (1995).

3. This judgment is certified as final for purposes of appeal.

4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 23rd day of October, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. William Dean Blackaby

Mr. Robert J. Campbell

Ms. Julie Maniaci Brennan - Certified Mail

Ms. Christine L. Noland

Ms. Anne L. MacIntyre - E-mailed

Submitted: August 25, 1997

1. Maniaci has apparently married and is now known as Julie Brennan. However, to avoid confusion, the Court will continue to refer to her by her maiden name.

2. **39-71-504. Funding of fund -- option for agreement between department and injured employee.** The fund is funded in the following manner:

(1) The department may require that the uninsured employer pay to the fund a penalty of either up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or \$200, whichever is greater. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment on how much premium would have been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

(2) The fund shall receive from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

(3) The department may determine that the \$1,000 assessments that are charged against an insurer in each case of an industrial death under 39-71-902(1) must be paid to the uninsured employers' fund rather than the subsequent injury fund.

(4) The department may enter into an agreement with the injured employee or the employee's beneficiaries to assign to the employee or the beneficiaries all or part of the funds received by the department from the uninsured employer pursuant to subsection (2).

Section 39-71-506, MCA (1995), provides for a lien for the amounts due under subsections (1) and (2) of section 39-71-504, MCA (1995).