IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 59

WCC No. 9905-8228

DENNIS HAND

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

G. JON ROUSH, d/b/a SWITCHBACK RANCH

Employer.

ORDER ON APPLICABILITY OF SECTION 39-71-511, MCA

Summary of Case: Claimant seeks occupational disease benefits from the Uninsured Employers' Fund (UEF). Through stipulation, the parties seek pretrial resolution of whether section 39-71-511, MCA, entitles the UEF to discharge or reduce claimant's claim for occupational disease benefits to the extent claimant has recovered in a settlement with Travelers Insurance Company and its insureds. While claimant's employer carried no workers' compensation insurance, it had a farm and ranch liability policy with Travelers. When claimant sued his uninsured employer for injuries suffered in the workplace, Travelers refused to provide coverage. Claimant obtained a judgment for $550,000 against the employer. To provide a means for satisfaction of that judgment, the employer assigned various claims *it* alleged against Travelers (e.g., failure to provide coverage or a defense) to claimant, who negotiated a settlement with Travelers for $328,500.

Held: The setoff provisions of section 39-71-511, MCA, apply to cases involving occupational disease benefits, even though the statute is contained within the Workers' Compensation Act (WCA). This application results from section 39-72-305(2), MCA, which states that provisions of the WCA relating to uninsured employers and benefits due uninsured claimants apply to and are incorporated into the ODA. In appropriate cases, the UEF is thus entitled to discharge or reduce claims for occupational disease benefits on the basis of civil recovery for the same alleged condition or harm. In this case, the Court is presently unable to determine the propriety of setoff because the factual stipulation does not make clear whether claimant's settlement with Travelers compensated him for the

same harm or condition for which he now seeks occupational disease benefits. Whether the General Release also releases the UEF is not presented for decision.

Topics:

> **Subrogation.** Under section 39-71-511, MCA, as applied to OD claims through section 39-72-305(2), MCA, the UEF is entitled to discharge or reduce OD claims on the basis of civil recovery for the same alleged condition or harm. Here, the WCC was unable to determine the propriety of setoff because the parties' factual stipulation did not state whether claimant's settlement compensated him for the same harm or condition for which he now seeks OD benefits.
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> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-305, MCA.** Under section 39-72-305(2), MCA, which states that provisions of the WCA relating to uninsured employers and benefits due uninsured claimants apply to and are incorporated into the ODA, the setoff provisions of section 39-71-511, MCA, apply to cases involving occupational disease benefits. In appropriate cases, the UEF is entitled to discharge or reduce claims for OD benefits on the basis of civil recovery for the same alleged condition or harm. Here, the WCC was unable to determine the propriety of setoff because the parties' factual stipulation did not state whether claimant's settlement compensated him for the same harm or condition for which he now seeks OD benefits.
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> **Uninsured Employers' Fund: Setoffs.** Under section 39-71-511, MCA, as applied to OD claims through section 39-72-305(2), MCA, the UEF is entitled to discharge or reduce OD claims on the basis of civil recovery for the same alleged condition or harm. Here, the WCC was unable to determine the propriety of setoff because the parties' factual stipulation did not state whether claimant's settlement compensated him for the same harm or condition for which he now seeks OD benefits.

¶1 This occupational disease case was transferred to this Court following enactment in 1999 of amendments to the Occupational Disease Act (ODA). The amendments give the Court original jurisdiction over disputed OD claims. § 39-71-602(2)(c), MCA (1999). Before proceeding to trial, the parties have agreed to submit the following legal issue to the Court for resolution:

> Is the Uninsured Employers' Fund entitled to a setoff under the provisions of § 39-71-511, MCA against petitioner's settlement with Travelers Insurance Company and its insureds?

(Stipulation at 2.)

¶2 The facts essential to the issue are set out in the Stipulation, which states as follows:

For the purposes of briefing the above question, the parties agree that the Court may assume the following facts to be true:

- At all relevant times, claimant Dennis Hand was an employee of the uninsured employer.
- Hand suffers from an occupational disease that arose while he was employed by that uninsured employer.
- Hand obtained a settlement from Travelers Insurance Company. Copies of the settlement documents are attached as Exhibit "A," and may be considered by the court in ruling on the question of law presented to the court.

(*Id*.)

¶3 Exhibit "A" to the Stipulation contains a five-page "Assignment and Agreement" and a four-page "General Release." According to those documents, Dennis Hand (Hand) worked as a ranch manager and ranch laborer for "G. Jon Roush and Katherine M. Roush, husband and wife, d/b/a the SWITCHBACK RANCH" (Roush) and was injured on September 18, 1992, and October 10, 1992. (Ex. A - General Release at 2.) Roush did not have Workers' Compensation insurance but had a farm and ranch liability policy with the Travelers Insurance Companies. (*Id*. at 1.)

¶4 Claimant brought a civil lawsuit against Roush. The action was filed in Cascade County (Cause No. SDV-94-204), then it was transferred to Ravalli County (Cause No. DV-94-387.) The Assignment and Agreement states: "This action was brought by First Party [claimant] to recover damages from the Second Parties, **for injuries experienced by First Party on September 18, and October 10, 1992.**" (Ex. A - Assignment and Agreement at 1, ¶ B, emphasis added.)

¶5 Travelers refused to extend coverage or to provide a defense to Roush. On September 21, 1995, judgment was entered against Roush in the amount of $550,000.

¶6 Roush then assigned his claims against Travelers to claimant and paid claimant $5,000 in return for claimant's covenant not to levy on Roush's assets or otherwise enforce the judgment against him personally. In relevant part, the Agreement provides:

> IT IS THEREFORE MUTUALLY AGREED as follows:
>
> 1. Second Parties [Roush] hereby assign to First Party [claimant] their rights and claims against The Travelers Insurance Companies, existing by reason of negligence, contract, bad faith, intentional conduct and/or violations of Montana Code Annotated Section 33-18-242 by said insurance company; by reason of failing to provide a legal defense to Second Parties for the claims of First Party in Cause No. DV-94-387, Twenty-First Judicial District Court, Ravalli County; and by failing and

refusing to provide liability coverage to Second Parties from the claims of First Party, as well as a judgment entered against Second Parties in favor of First Party in the sum of $550,000.00.

2. Second Parties hereby assign to First Party their rights and claims against The Travelers Insurance Companies for payment of attorneys fees and costs incurred by the Second Parties in the defense of Cause No. DV-94-204, Eighth Judicial District Court, Cascade County, and Cause No. DV-94-387, Twenty-First Judicial District Court, Ravalli County.

3. In consideration of the foregoing assignments, the payment of $5,000.00 by Second Parties to First Party, and other valuable consideration, First Party, on behalf of himself, his heirs, executors, and assigns, agree that he will not levy an execution on or in any other manner seek at any time to enforce the said judgment, or any part thereof, against Second Parties, individually or against their assets or income, but will only pursue an action to recover the amount due upon the judgment against The Travelers Insurance Companies based upon the assignment executed herewith.

4. This assignment, particularly First Party's covenant in the preceding paragraph not to levy or in any other manner seek to enforce the said judgment against Second Parties, is not intended and shall not be construed to release The Travelers Insurance Companies from liability to Second Parties or from liability to First Party as their assignee for the negligence, and/or intentional conduct, and/or bad faith, and/or breach of the unfair practices act, and/or breach of contract on the part of The Travelers Insurance Companies, resulting in the entry of said judgment.

. . . .

6. This assignment and agreement does not affect First Party's right to proceed with a claim, if any, for uninsured employers fund workers' compensation benefits.

(Ex. A - Assignment and Release at 2-4.)

¶7 Claimant then negotiated settlement with Travelers. On January 17, 1996, claimant executed a General Release, which provides in full as follows:

That I, DENNIS HAND, for and in consideration of the sum of THREE HUNDRED TWENTY-EIGHT THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($328,500.00) paid to me by TRAVELERS INSURANCE COMPANIES, the receipt and sufficiency of which is hereby acknowledged, have released and discharged and by these presents **do release and forever discharge G. JON ROUSH and KATHERINE M. ROUSH, husband and wife, d/b/a the SWITCHBACK RANCH**, the said TRAVELERS INSURANCE COMPANIES, and their past, present, and future officers, directors, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates,

partners, predecessors and successors in interest, assigns, insurers, reinsurers, and all other persons, firms, or corporations (hereinafter collectively referred to as the Releasees), whether herein named or referred to or not, and who, together with the above-named released parties, may be in anywise directly or indirectly liable to me, **of and from any and all actions and causes of action, claims, and demands of every kind whatsoever, whether arising out of contract or tort or by operation of law, and whether for compensatory or punitive damages, from the beginning of time until the date of this release.** This release shall include, but is not limited to, all my claims for damages, punitive damages, fraud, mental suffering, emotional distress, physical distress, psychic injury, costs, unfair claim settlement practices arising under Title 33, Chapter 18, Montana Code Annotated and compensation of every kind, arising from and by reason of any conduct, acts, or omissions to act by Releasees in investigating, adjusting, handling, litigating, and negotiating various claims of mine arising as a result of injuries that I suffered on or about September 18, 1992 and October 10, 1992 at Florence, Montana, while working for G. Jon Roush and Katherine M. Roush, husband and wife, d/b/a the Switchback Ranch.

The payment named herein is the sole consideration for this Release, and such consideration is contractual and not a mere recital. All agreements and understandings between the parties hereto are reflected herein. I acknowledge that G. Jon Roush and Katherine M. Roush, husband and wife, d/b/a the Switchback Ranch, and the Travelers Insurance Companies do not admit liability, but expressly deny the same, and that the consideration reflected herein is paid and accepted in compromise of doubtful and disputed claims, and that the making of this settlement does not constitute and is not to be construed as an admission of liability on the part of G. Jon Roush and Katherine M. Roush, husband and wife, d/b/a the Switchback Ranch, and the Travelers Insurance Companies or their legal representatives.

It is also agreed that **this Release covers all claims past, present, or in the future which can ever be asserted by me, DENNIS HAND, for any and all future loss and damages arising out of said occurrences not now known to any of the parties hereto, but which may later develop or be discovered, including the effects or consequences thereof.**

I do hereby state that I am of legal age, have carefully read the foregoing Release, and that its terms have been completely read and explained to me by my attorneys. I know the contents thereof, and have executed the same as my own free act and solely in reliance upon my own judgment and not in reliance upon any representation or statement or promise of Releasees or their representatives.

> **I hereby stipulate and agree that my attorneys of record shall, upon execution of this agreement and payment of the monies prescribed herein, satisfy the judgment entered on September 21, 1995 by the presiding judge in the civil action pending in State District Court, Montana Twenty-First Judicial District Court, Ravalli County, entitled Dennis Hand, Plaintiff, v. G. Jon Roush and Katherine M. Roush, D/B/A Switchback Ranch, Defendants, Cause No. DV-94-387.**

(Ex. A - General Release at 1-3, emphasis added.)

Discussion

¶8 While the releases provided to the Court indicate claimant suffered injuries in 1992, it is unclear when the claim for occupational disease arose. However, section 39-71-511, MCA, which is at issue, was adopted in 1985 and has not been amended since its adoption. Therefore, I assume that the occupational disease arose after the effective date of the section. In any event, 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.

¶9 A constitutional challenge to section 39-71-511, MCA, was rejected in the recent case of *Thayer v. Uninsured Employers' Fund,* 1999 MT 304, 991 P.2d 447. At issue was the UEF's liability for death benefits to the claimant's widow following her recovery of civil damages. The widow, Phyllis Thayer, settled claims against her husband's uninsured employer, a co-employee, and the seller and manufacturer of a product alleged to have contributed to her husband's death. Following Phyllis' receipt of $100,000 from the uninsured employer, the UEF "applied the setoff provision as provided by § 39-71-511, MCA, in order to discharge the remaining $74,301 of future benefits that Phyllis would have been entitled to receive from the Uninsured Employers' Fund." *Id*. 1999 MT 304 at ¶ 15, 991 P.2d at 449. The Supreme Court upheld the offset.

¶10 The question raised in this case is whether section 39-71-511, MCA, authorizes the UEF to setoff claimant's settlement with Travelers and Roush against his occupational disease claim.

¶11 Initially, it is clear that section 39-71-511, MCA, applies to occupational disease claims. Section 39-72-305(2), MCA, of the ODA provides that "[t]he provisions of the Workers' Compensation Act relating to uninsured employers and benefits due uninsured claimants apply to and are incorporated as part of this chapter." Section 511 is a provision

relating to uninsured employers and benefits due uninsured claimants. Thus, it is incorporated into the ODA through section 39-72-305(2), MCA, and the UEF is entitled to offset recoveries for the same alleged harm against its obligation for occupational disease benefits regardless of whether the claimant has been made whole by the recovery.

¶12 Claimant argues that a setoff in this case is improper because he recovered from Travelers on claims resulting from Traveler's failure to defend or to provide coverage, which he argues involve matters of contract, breach of insurance duty, or unfair practices under Montana law. He argues the recovery was not for harm he suffered in the workplace. His argument is inconsistent with the facts proffered the Court. According to the stipulated facts as set out in the exhibits, claimant received a monetary judgment against Roush, the uninsured employer, for $550,000. To avoid levy against his assets, and to provide a source of funds for satisfaction of the judgment, Roush assigned his claims against Travelers to claimant. The assignment resulted from claimant's recovery against Roush, which **was** for workplace injuries. His settlement with Travelers thus compensated him for the workplace injuries alleged in the lawsuit against Roush. Moreover, the General Release executed by claimant expressly provided that settlement with Travelers satisfied "the judgment entered on September 21, 1995 by the presiding judge in the civil action . . . entitled Dennis Hand, Plantiff, v. G. Jon Roush and Katherine M. Roush, D/B/A Switchback Ranch, Defendants, Cause No. DV-94-387." (Ex. A - General Release at 3.) Reading the Assignment and Agreement and the General Release together leaves no question that claimant received the $328,500 from Travelers as the result of his judgment against Roush. Thus, if the claims against Roush, though characterized as industrial injuries, are the same claims proffered here under the ODA, the setoff applies.

¶13 The setoff, however, does not extend to any injuries not encompassed within the present occupational disease claim. The section pertains to monies received from the employer or third parties on account of the injury or occupational disease for which the UEF is liable, not to monies the claimant may receive from them on unrelated matters.

¶14 I cannot determine from the limited facts provided whether the occupational disease claim in this case is for the same harm alleged by claimant in his civil suit against Roush. While claimant's lawsuit against Roush alleged he was injured on "September 18, 1992 and October 10, 1992" (ex. A - Assignment and Agreement at 1, ¶ B), the sole information provided with respect to the occupational disease is the parties' stipulation asking the Court to "assume " claimant "suffers from an occupational disease that arose while he was employed by [the] uninsured employer." (Stipulation at 2.)

¶15 UEF argues the General Release signed by Hand is sufficiently broad for the Court to conclude setoff is appropriate. Specifically, UEF points to language that Hand does "release and forever discharge G. JON ROUSH and KATHERINE M. ROUSH, husband and wife, d/b/a the SWITCHBACK RANCH . . . from any and all actions and causes of action,

claims, and demands **of every kind whatsoever** whether from compensatory or punitive damages from the beginning of time until the date of this release." (Ex. A - General Release at 1.) Based on such language, UEF argues the settlement necessarily included whatever condition Hand now alleges entitles him to occupational disease benefits.

¶16 The Court cannot determine the propriety of setoff on the basis of this language in the General Release without full development of the facts of this matter. The essential question is whether claimant has previously recovered, through the lawsuit against Roush and settlement with Travelers, for the same harm for which he seeks occupational disease benefits.

¶17 Finally, the UEF suggests the broad language of the General Release bars any further recovery by claimant for harm suffered during employment, not as a matter of setoff under section 39-71-511, MCA, but as the result of the contract set out in that document. In the General Release, Hand released and discharged not only Roush and Travelers, but also their

> . . . agents, servants, representatives, employees, subsidiaries, affiliates, partners, predecessors and successors in interest, assigns, insurers, reinsurers, **and all other persons, firms, or corporations (hereinafter collectively referred to as the Releasees), whether herein named or referred to or not, and who, together with the above-named released parties, may be in anywise directly or indirectly liable to me,** of and from **any and all actions and causes of action, claims, and demands of every kind whatsoever, whether arising out of contract or tort or by operation of law, and whether for compensatory or punitive damages, from the beginning of time until the date of this release.**

(Ex. A - General Release at 1.) UEF argues that under the holdings in *Thayer* the UEF "merely stands in the place of the uninsured employer, to provide some basis for recovery where the employer is impecunious," *Thayer, supra,* 1999 MT 304 at ¶ 23, 991 P.2d 447 at 450, thus it is entitled to the benefits of the release.

¶18 As the UEF recognizes, this argument raises a different issue than the issue the parties agreed to present to the Court at the pretrial conference. I decline to address it here.

ORDER

¶19 For the reasons set forth in the foregoing discussion, I find factual stipulation presented to the Court is insufficient to conclude whether the UEF is or is not entitled to a setoff under section 39-71-511, MCA.

¶20 DATED in Helena, Montana, this 18th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Mark Cadwallader
Mr. Tom L. Lewis
Submitted: June 22, 2000