

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 41

WCC No. 9511-7445

NEVA MANWEILER, CHAD MANWEILER & NATHAN MANWEILER,

Petitioners

vs.

THE TRAVELERS INSURANCE COMPANY

Respondent/Insurer for

PLUM CREEK TIMBER COMPANY,

INCORPORATED

Employer.

**ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND DENYING
RESPONDENT'S SUMMARY JUDGMENT MOTION**

Summary: An occupational disease claimant entered into a settlement agreement with the insurer. After the worker died as the result of his occupational disease, this case was filed for death benefits. The insurer contended the claim for death benefits is barred by the settlement. A motion and cross-motion for summary judgment were before the Court.

Held: Under the 1985 laws, a claim for death benefits is separate from an occupational disease claimant's own claim for benefits. In particular, section 39-72-403(1), MCA (1985), makes clear that claims for death benefits may, and must, be presented after a decedent's death, providing a separate and distinct claim by death benefit beneficiaries. If any amount of monies already paid as the result of the occupational disease are attributable to periods of time after decedent's death, the insurer would be entitled to a credit for such monies pursuant to section 39-72-711, MCA (1985).

Topics:

Constitutions, Statutes, Regulations and Rules: section 39-72-403(1), MCA (1985). Under the 1985 laws, a claim for death benefits is separate from an occupational disease claimant's own claim for benefits. In particular, section 39-72-403(1), MCA (1985), makes clear that claims for death benefits may, and must, be presented after a decedent's death, providing a separate and distinct claim by death

benefit beneficiaries. If any amount of monies already paid as the result of the occupational disease are attributable to periods of time after decedent's death, the insurer would be entitled to a credit for such monies pursuant to section 39-72-711, MCA (1985).

Benefits: Death Benefits: Generally. Under the 1985 laws, a claim for death benefits is separate from an occupational disease claimant's own claim for benefits. In particular, section 39-72-403(1), MCA (1985), makes clear that claims for death benefits may, and must, be presented after a decedent's death, providing a separate and distinct claim by death benefit beneficiaries.

Benefits: Death Benefits: Offset for Prior Settlement. Under the 1985 laws, a claim for death benefits is separate from an occupational disease claimant's own claim for benefits. If any amount of monies already paid as the result of the occupational disease are attributable to periods of time after decedent's death, the insurer would be entitled to a credit for such monies pursuant to section 39-72-711, MCA (1985).

This matter is before the Court on cross-motions for summary judgment. While certain facts are brought to the Court's attention, the issue raised in this case involves a matter of law, to wit: whether a settlement and release agreement executed between an injured worker and the insurer in an occupational disease case bars an action by the worker's beneficiaries for death benefits when the worker later dies on account of his occupational disease.

The salient facts are set forth in admitted paragraphs of the petition and in the Affidavit of Bradley J. Luck filed on behalf of respondent. Attached to the Luck affidavit are numerous exhibits which reflect the history of the case. Petitioners do not challenge the exhibits and they are cited for the specific facts set forth in this decision.

Factual Background

The decedent, Harold Manweiler, worked for Plum Creek Timber Company, which at the times relevant to this action was insured by Travelers Insurance Company. (See Pleadings and Briefs.) During his employment he was exposed to carbide and cobalt dust from carbide tipped grinding blades. (Ex. 1.) He developed Churg-Strauss syndrome.⁽¹⁾

On or about November 13, 1986, decedent filed a workers' compensation claim based on his Churg-Strauss syndrome. (Ex. 1.) He listed an "injury" date of August 16, 1985, and attributed his condition to workplace exposure to carbide dust. (*Id.*) Travelers denied the claim under the Workers' Compensation Act but later accepted it as an occupational disease. (Petition ¶¶ 2-3; Response ¶ 1.)

In the meantime, the decedent and his wife had commenced a third-party action against the manufacturer of the carbide saw tips. (Ex. 3.) Travelers declined to fully participate in that action but asserted a 50% subrogation interest in it. (Exs. 9, 11.)

In 1988 the decedent and Travelers entered into settlement negotiations. (Exs. 15-17.) Those negotiations resulted in a settlement for the sum of \$30,000. The agreement (Ex. 28), which was approved by the Department of Labor and Industry (Ex. 30), released Travelers from further liability, other than for medical benefits, under both the Workers' Compensation Act (WCA) and the Occupational Disease Act (ODA). Travelers, in turn, waived "any existing or future subrogation interest" in the third-party action which claimant had previously filed.

The specific language releasing the insurer from further liability provides in relevant part:

The claimant, in signing and submitting this petition to the Division of Workers' Compensation, further understands that if this petition is approved, **the above-named employer and insurer are forever released from payment of disability compensation benefits under either the Workers' Compensation Act or the Occupational Disease Act for injuries or diseases claimed to have been suffered as indicated above.**

....

If the petition is approved, the claim will be forever closed and can never again be reopened.

(Ex. 28.) The Department order approving the settlement contains similar but not identical language. It refers to the WCA but omits any mention of the Occupational Disease Act:

These negotiations have resulted in a proposed full and final compromise settlement of the claim wherein the claimant is to receive as a settlement THIRTY THOUSAND DOLLARS AND NO CENTS (\$30,000.00) [in a lump sum] in addition to all compensation benefits previously paid. Further medical and hospital benefits have been reserved by the claimant.

....

IT IS THEREFORE ORDERED that the insurer pay to the claimant the amount of compensation specified above, in addition to any sums that may have been previously paid, in a full and final compromise settlement of the claimant's claim. Future medical and hospital benefits have been reserved by the claimant.

IT IS FURTHER ORDERED that the claimant shall accept the above amount as a full and final compromise settlement and that, subject only to the authority of the Workers' Compensation Judge to disapprove this order within ten (10) days of the

Judge's receipt of this order, the insurer is fully released and discharged from all further obligations for compensation benefits for this injury under the Workers' Compensation Act.

(Ex. 30.) The Department order approving the settlement was dated December 2, 1988. (*Id.*) A "RETURNED" stamp indicates that the petition was then submitted to this Court for review and returned by it to the Department on December 6, 1988. (*Id.*)

Meanwhile, negotiations to settle the third-party action filed by decedent and his wife were fruitful, resulting in a settlement amounting to \$256,046 present value according to a November 10, 1988, letter written by decedent's counsel.

Decedent died on July 12, 1995. (Petition ¶ 7; Response ¶ 4.) Travelers does not contest petitioners' allegations that his death was the result of his occupational disease. (Petition ¶7.) It responds to that allegation by stating, "He apparently died as a result of complications from his occupational disease." (Response ¶ 4.)

Following decedent's death, his widow and two children submitted a claim for death benefits. The claim was dated August 22, 1995, and signed by Alan M. McGarvey as attorney for the "beneficiaries." McGarvey had represented decedent as well.

Travelers initially responded to the claim by initiating payment of death benefits under a reservation of rights, specifically invoking section 39-71-608, MCA. (Ex. 32.) After further review, Travelers, through its attorney Bradley J. Luck, wrote to McGarvey on November 16, 1995. (Ex. 33). Relying on the prior settlement entered into between decedent and Travelers, Luck informed McGarvey:

We believe that the facts of this particular matter must control. On that basis, we do not believe that the beneficiaries of Mr. Manweiler can maintain a separate death benefit claim at this time.

(*Id.*) The letter gave notice that Travelers was terminating benefits 14 days hence. (*Id.*) The present petition followed within a week.

Appropriateness of Summary Judgment

Summary judgment must be granted "if the pleadings, the depositions, answers to interrogatories, and responses to requests for production, together with affidavits, if any, show, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ARM 24.5.329.

In this case the material and uncontroverted facts are:

1. Decedent suffered from an occupational disease.

2. He filed a Claim for Compensation on or about November 13, 1986. The claim, which is found at Exhibit 1, listed August 16, 1985, as the date of onset.
3. Travelers accepted his claim under the ODA.
4. Decedent entered into a settlement agreement with Travelers, the terms of which are set forth in Exhibit 28.
5. The Department of Labor and Industry approved the settlement. The Department's order is Exhibit 30.
6. Decedent died on July 12, 1995, as a result of complications from his occupational disease.
7. The petitioners herein are decedent's wife and two children. (Ex. 31, Pleadings and Briefs.)
8. Following decedent's death the petitioners sought death benefits under the ODA. (Ex. 31.) Travelers initially paid death benefits but under a reservation of rights. (Ex. 32.)
9. On November 16, 1995, Travelers denied liability, asserting that the settlement agreement between itself and decedent barred any further claim by decedent's beneficiaries. (Ex. 33.) It terminated benefits effective December 5, 1995.

These facts lay the predicate to the present dispute, which is whether the 1988 settlement agreement between decedent and Travelers releases Travelers from liability for death benefits. The Court is not asked to determine specific benefits. Summary judgment is therefore appropriate.

Discussion

According to Professor Larson's treatise on workers' compensation law, an injured worker's settlement of his claim does not affect his beneficiaries' entitlement to benefits should he or she later die. In black letters, the treatise says:

§ 64.00 The dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent. Accordingly, death benefits are not affected by compromises or releases executed by decedent, or by an adverse holding on decedent's claim, or by claimant's failure to claim within the statutory period.

....

2 Larson, Workmen's Compensation Law, § 64.00, p. 11-60 (1995).

Of course, Montana law governs the matter and must be followed irrespective of the general rule set out in Larson.

Under the WCA, the entitlement of beneficiaries to death benefits is governed by the law in effect at the time of the decedent's injury, not the law in effect at the time of death. *Iverson v. Argonaut Ins. Co.*, 198 Mont. 340, 645 P.2d 1366 (1982). While the Supreme Court of Montana has not specifically addressed what law should apply in occupational disease cases, in *Kraft v. Flathead Valley Lab. and Cont'rs.*, 243 Mont. 363, 366, 792 P.2d 1094, 1096 (1990), it considered the date on which a claim for carpal tunnel syndrome arose and determined that the law in effect "during the period" of time the condition arose should be applied. *Kraft* involved an old law, micro-trauma claim made under the Workers' Compensation Act; however, the same test should apply in occupational disease cases, at least where the condition surfaces at a definite time, as it did in this case. Applying the rule of *Iverson*, the law in effect during the period in which decedent's claim arose governs the present case. That claim, which was filed in November 1986, dates the onset of his condition as August 16, 1985. The claim was accepted, thus the 1985 version of the ODA applies.

Death benefits under the 1985 ODA are governed by section 39-72-701, MCA (1985), which provides in relevant part:

(1) The compensation to which . . . the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, are entitled under this chapter shall be the same payments which are payable to **an injured employee**, and such payments shall be made for **the same period of time as is provided** in cases of temporary total disability, permanent total disability, and **in cases of injuries causing death under the Workers' Compensation Act**. [Emphasis added.]

It thus appears that the amount and duration of death benefits under the ODA is governed by the death benefits provisions of the WCA.

The amount and duration of death benefits under the WCA are set forth in section 39-71-721, MCA (1985), which provides in relevant part:

(1) If an injured employee dies and the injury was the proximate cause of such death, then the beneficiary of the deceased, as the case may be, is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefit is paid **shall be reduced by the period during or for which compensation was paid for the injury**.

(2) To beneficiaries as defined in subsections (2)(a) through (2)(d) of 39-71-116, weekly compensation benefits for injury causing death are computed at 66% of the decedent's wages. The maximum weekly compensation benefits may not exceed the state's average weekly wage. The minimum weekly compensation for death is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of his death. [Emphasis added.]

The effect of the bolded language in subsection (1) will be addressed later on in this decision.

In arguing that the petitioners are not entitled to death benefits, Travelers asserts that there is "but one claim" for occupational disease benefits; that the petitioner's entitlements are "derivative" of the decedent's entitlement; and that, therefore, any entitlement the beneficiaries may have had was extinguished when the decedent in this case settled the claim. It further urges that the statute governing settlements under the ODA provides that a release by claimant extends to any future liability for a death benefit. (Employer's and Insurer's Brief in Opposition to Petitioners' Motion for Summary Judgment and in Support of Employer's and Insurer's Motion for Summary Judgment at 10.)

In arguing that there is but one, single claim, "subject to full resolution" by the injured worker, Travelers cites the Court to section 39-72-406(4), MCA (1985). (*Id.*) Section 39-72-406(4), MCA, however, was repealed by the 1985 legislature and therefore has no application to this case. It is doubtful that Travelers intends to rely on 1983 laws since it has cited the 1985 provisions of the ODA throughout its brief and does not argue that earlier law applies. In any event, even if the 1983 version were to apply in this case, section 39-72-406(4), MCA (1983), does not support Travelers' position since the section concerns the time in which *death* must occur from occupational disease. Reference to the filing of a claim by the beneficiaries is within the context of an exception to a three-year limitation applicable to claims for death benefits.⁽²⁾

The provision which *is* determinative of the nature of a death claim is section 39-72-403(1), MCA (1985), which was also in effect in 1983. It states:

Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the division within 2 years from the date the claimant knew or should have known that his total disability condition resulted from an occupational disease. **When a beneficiary seeks benefits under this chapter, his claims for death benefits must be presented in writing to the employer, the employer's insurer, or the division within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.**

On its face the section provides for a *separate and distinct claim* by a beneficiary. It also provides a separate statute of limitations applicable to such claim. Language in *Iverson*, 198 Mont. at 342⁽³⁾

, cited by Travelers, is inapposite since the Court in that case was addressing the WCA, not section 39-72-403(1), MCA, of the ODA, and what was said was in the context of the statute of limitations under the WCA. As set forth in 39-72-403(1), MCA, the ODA specifies a

separate statute of limitation for death claims. Thus, Travelers' first argument is unpersuasive.

Travelers' second argument is similarly unpersuasive. The release itself did not purport to release or waive prospective benefits to decedent's beneficiaries; indeed it does not mention death benefits or beneficiaries at all. Section 39-72-711, MCA (1985), cited by Travelers as compelling the conclusion that the decedent's release encompasses petitioners' claims, refers to a settlement entered into between an insurer and a *claimant*, providing:

39-72-711. Lump-sum and compromise settlements. (1) No final and binding award made upon any claim pursuant to this chapter may be converted into a lump-sum payment, in whole or in part, except as provided in this section or 39-72-712.

(2) Whenever there are contested issues as to an insurer's liability for a claim under this chapter, including a claim based on 39-72-405(2), **a claimant and an insurer** may enter into a full and final compromise settlement of the **claim**. However, no such settlements are binding **on the parties** until approved by the division. After the division approves a full and final compromise settlement, the claim is closed and the insurer's liability for a settled claim is forever released. [Emphasis added.]

The section does not refer to beneficiaries or authorize the claimant to settle the potential entitlement of his or her beneficiaries. The plain language states that "no such settlements are binding *on the parties* until approved by the division;" by necessary implication, upon approval of the Division the agreement is binding *on the parties*. "Parties" in the context of a settlement agreement refers to the persons who enter into the agreement. Thus, the language about releasing the insurer's liability for a settled claim extends only to the decedent's claim and does not encompass the beneficiaries' prospective entitlements. I therefore determine that the 1988 settlement does not bar the petitioners' entitlement to death benefits.

The California cases cited by Travelers lend support to my determination herein. Those cases, which held that a settlement agreement between an insurer and the injured worker could release the claims of the worker's beneficiaries, were based on (1) an express statute authorizing such release and (2) specific language in the actual settlement agreement stating that the release extended to the worker's beneficiaries. *Johnson v. Workmen's Compensation Appeals Board*, 471 P.2d 1002 (Cal. 1970). In a subsequent case, the California court held the language in the standard agreement used in California was no longer sufficient to release a beneficiaries' right to death benefits. *Sumner v. Workmen's Compensation Appeals Board*, 663 P.2d 534 (Cal. 1983). Unlike California statute, the applicable Montana statute does not expressly authorize the injured worker to release the prospective benefits of his beneficiaries. Moreover, unlike the settlement agreement and

release used in California, the agreement between decedent and Travelers does not mention any potential claims of decedent's beneficiaries.

Section 39-71-721(2), MCA (1985), also lends further support to my determination. As quoted earlier, it provides for a reduction in death benefits "by the period during or *for which* compensation was paid for the injury." Since the ODA incorporates the WCA provisions governing period of time for payment of death benefits, this language applies to ODA death benefits. The language contemplates lump-sum advances to the injured worker since it provides not only for a reduction due to benefits paid "during the period" but also for a reduction for periods "for which" benefits were paid. The "for which" language was plainly intended to cover future periods for which prospective benefits are advanced to the worker. It thereby protects the insurer from duplicate payments when lump summing occurs, as it did in this case.

Finally, the Court need not address petitioners' constitutional contentions since they are advanced only to support their statutory construction arguments. Moreover, this case has been decided in their favor.

JUDGMENT

1. The petitioners are entitled to, and The Travelers Insurance Company shall pay to petitioners, death benefits under the Occupational Disease Act. Such benefits shall include biweekly compensation benefits, as well as the expense of decedent's last illness and burial expenses not to exceed the sum of \$1,400. §§ 39-72-704, -705 and 39-71-725, MCA (1985). Travelers is entitled to a credit for any payments already made. If any portion of the settlement monies paid to decedent are attributable to periods of time after decedent's death, then the amount of benefits for those periods shall also be credited to Travelers.

2. Petitioners are further entitled to attorney fees and costs in an amount to be determined by the Court. *Vernon L. Ingebretson v. Louisiana-Pacific Corp.*, WCC No. 9403-7030, decided December 14, 1994 at 7; aff'd on appeal, *Ingebretson v. Louisiana-Pacific Corp.*, 900 P.2d 912, 916 (1995). Petitioners shall have 10 days in which to submit their verified memorandum of costs. Respondent shall then have 10 days in which to file its objections, if any. The amount of the attorney fees is reserved until the time for appeal has expired or, if appealed, until the remittitur is received.

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

Dated in Helena, Montana, this 6th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Allan M. McGarvey
Mr. Bradley J. Luck
Submitted: March 21, 1996

1. The Court does not have the benefit of medical testimony or opinions regarding the nature of Churg-Strauss syndrome. A quick review of Dorland's Illustrated Medical Dictionary (27th Ed.) describes the syndrome in medical jargon, requiring even further references to the dictionary. Briefly described, Churg-Strauss syndrome is an "allergic granulomatous angiitis." Angiitis is an "inflammation of a vessel, chiefly of a blood or a lymph vessel" and is also called "vasculitis." "Allergic granulomatous" is "a form of systemic necrotizing vasculitis in which there is prominent lung involvement, generally manifested by eosinophilia, granulomatous reactions, and usually severe asthma; if present, cutaneous lesions consist of tender subcutaneous nodules, large ecchymotic plaques, and cutaneous infarcts."

"Granulomatous" means "any condition characterized by the formation of multiple granulomas." A "granuloma" is "an imprecise term applied to (1) any small nodular delimited aggregation of mononuclear inflammatory cells, or" "Necrotizing" refers to cell and tissue death. An August 22, 1985 medical report by a specialist at the Mason Clinic in Seattle, Washington listed decedent's symptoms as including asthma and vesicular lesions and rash, among other things. (Ex. 5.)

2. Section 39-72-406(4) (1983) provides:

No compensation may be paid for death from any occupational disease, other than silicosis or due to ionizing radiation, unless death results within 3 years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during a period of continuous total disability from an occupational disease, other than silicosis or ionizing radiation, for which compensation has been paid or awarded or for which a claim, compensable but for such death, is on file with the division. In such cases, compensation shall be paid to the beneficiaries if death results from the occupational disease.

3. Quoting from 82 A.L.R. 1244, 1245 (1933), the Court in *Iverson* said:

"As regards the rights of relatives or dependents of a deceased employee to compensation, it is generally held that their rights are controlled by the law as it existed at the time of the injury to the employee, rather than the law as it existed at his death or at the time of the award, the theory being that the workmen's compensation act does not create new rights of action in the relatives or dependants of an employee on his death, but that his right merely survives for their benefit.

198 Mont. 340, 342, 645 P.2d 1366, 1367 (1982).