IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 48

WCC No. 9309-6893

MONTANA SCHOOLS GROUP WORKERS' COMPENSATION RISK RETENTION PROGRAM

Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRY/ EMPLOYMENT RELATIONS DIVISION

Respondent.

ORDER AMENDING APRIL 21, 1998 ORDER AND JUDGMENT

Summary: In a prior decision, Montana Schools Group Workers' Compensation Risk Retention Program v. Department of Labor and Industry/Employment Relations Division, 1998 MTWCC 31, the WCC found assessment rules promulgated by the DOL following a 1995 decision by this Court to be invalid. The Court ordered an evidentiary hearing to determine which DOL costs for workers' compensation regulation were direct costs, but recused itself from conducting that hearing. Subsequently, both parties requested the Court to amend or reconsider its rulings.

Held: Upon reflection and in light of arguments by both parties, the Court concludes it should not have ordered an evidentiary hearing on direct costs, but should once again remand the matter to the DOL for rulemaking. The Court's view on the validity of the DOL position on direct costs does not change and is reiterated. While the Court agrees with the DOL that the rulemaking process does not require the DOL to hold a contested case hearing, make findings of fact, and provide a detailed explanation for its rules, the nature of rulemaking under section 39-71-201, MCA (1991) requires the Department to establish some sort of factual basis for its determination as to what costs do and do not constitute direct costs. Otherwise, the Department would be free to disregard and nullify statutory criteria it is required to implement. Given the length of time this matter has been in litigation, the WCC finds it is unlikely, if not impossible, that the Department could retroactively determine and allocate direct costs. Therefore, the Court orders that MSG

shall be liable only for the part of the assessment which is based on indirect costs. Although attorneys fees are not awarded to MSG based on earlier litigation of this matter, it is awarded attorney fees on this enforcement proceeding because this matter has become an "extreme case" in which justice and equity require an award of fees.

Topics:

Administrative Agencies: Rules: Rulemaking. Following parties' request that WCC reconsider its orders in Montana Schools Group Workers' Compensation Risk Retention Program v. Department of Labor and Industry/Employment Relations Division, 1998 MTWCC 31, WCC concludes it should not have ordered an evidentiary hearing on direct costs, but should once again remand the matter to the DOL for rulemaking. The Court's view on the validity of the DOL position on direct costs does not change and is reiterated. While the Court agrees with the DOL that the rulemaking process does not require the DOL to hold a contested case hearing, make findings of fact, and provide a detailed explanation for its rules, the nature of rulemaking under section 39-71-201, MCA (1991) requires the Department to establish some sort of factual basis for its determination as to what costs do and do not constitute direct costs. Otherwise, the Department would be free to disregard and nullify statutory criteria it is required to implement.

Attorney Fees: Cases Awarded. Although attorneys fees are not awarded to Montana Schools Group Risk Retention Program based on earlier actions to contest department's assessment of costs to it, attorneys fees are awarded on this enforcement proceeding because the position taken by the Department of Labor resulted in repeated proceedings, making this an "extreme case" in which justice and equity require an award of fees.

¶1 On April 21, 1998, this Court entered an Order Regarding Assessment Rules holding that the Department of Labor and Industry's (Department) assessment rules promulgated following the Court's 1995 Decision in this case were invalid and void. I ordered an evidentiary hearing to determine what Department costs for workers' compensation regulation are "direct costs," however, I indicated I would recuse myself with respect to the hearing.

¶2 On May 5, 1998, the petitioner, Montana Schools Group Workers' Compensation Risk Retention Program (MSG), filed a motion for amendment or reconsideration of the April 21, 1998 Order and Judgment. On April 8, 1998, the Department filed a similar motion. On that date, I also met with counsel and agreed to accept further briefs regarding the motions.

¶3 After reviewing the parties' arguments, and upon further reflection, I find good cause to amend the April 21, 1998 Order and Judgment.

I.

¶4 Initially, both parties argue that, in ordering an evidentiary hearing to determine direct and indirect costs, I usurped the Department's rulemaking power. I agree.

¶5 In ordering an evidentiary hearing, I was influenced by several factors, including (1) the failure of the Department to comply with the Court's prior decision; (2) the Department's apparent partiality to the existing method of assessment, which interfered with it objectively carrying out its statutory mandate; (3) the six-year lapse since MSG commenced this proceeding; and (4) the two-year delay between my 1995 Decision ordering rulemaking and the actual adoption of rules.

¶6 I was also influenced by, although I did not cite, *Brackman v. Board of Nursing,* 258 Mont. 200, 851 P.2d 1055 (1993). *Brackman* was a judicial review of disciplinary action taken by the Board of Nursing (Board) against three nurses. After overturning the Board's disciplinary decision, the District Court declined to remand the case for further proceedings. Rather, it adopted the hearing officer's recommendation for disciplinary action, a recommendation that the Board had disregarded.

¶7 In refusing to remand the matter to the Board of Nursing for further consideration, and in imposing its own disciplinary judgment, "[t]he District Court found that the Board violated its neutrality and impartiality and had become 'irreparably tainted'." 258 Mont. at 207, 851 P.2d at 1059. The Supreme Court agreed with that analysis and found a further reason for the District Court to finally resolve the matter:

> The District Court's decision not to remand the action to the Board for determination of discipline is further supported by the need for final resolution of this matter. As evidence of absence of bias on its part, the Board points out that it now has several new members who did not consider this matter the last time it was before the Board. But the new Board members would require time to study the record before the Board could meet and enter an order. The nurses have been under the cloud of this litigation long enough.

258 Mont. 207-08, 851 P.2d at 1059.

¶8 Upon further reflection and analysis, I have concluded that *Brackman* does not support this Court substituting itself for the Department in a rulemaking proceeding. *Brackman* involved a contested case hearing, which is a quasi-judicial function and which is subject to greater scrutiny upon judicial review than is an agency

rule. In addition, the district court did not fashion its own remedy, rather it adopted one recommended by a hearing examiner of the Board of Nursing. MSG is correct in its assertion that *Northwest Airlines v. STAB,* 221 Mont. 441, 720 P.2d 676, 678-79 (1986), precludes the Court from adopting rules to replace invalid agency rules.

¶9 I therefore conclude that I erred in ordering an evidentiary hearing. This matter must once again be remanded to the Department for rulemaking.

II.

¶10 While both parties oppose an evidentiary hearing of the sort ordered on April 21, 1998, the Department seeks a more limited evidentiary hearing for the purpose of persuading the Court that there is a substantial factual basis for its rules and that the rules are therefore valid. The Department requested such a hearing prior to my April 21, 1998 Decision. Unfortunately, I did not directly address its request. I should have done so.

¶11 At the time of the April 21, 1998 Decision, I was persuaded that the scope of review concerning the validity of the rules precluded the Court from supplementing the record of the rulemaking proceeding. I am still of that opinion.

¶12 As I found in my 1995 Decision, the statute regarding the assessment gives the Department discretion in determining what costs constitute "direct costs." However, the discretion granted the Department is not a license to ignore the statutory criteria set out in the statute. Section 39-71-201, MCA (1991), requires the Department to identify what costs can be reasonably and practically assigned to each of the three workers' compensation plans. Costs that can be readily and practically assigned to the individual plans are direct costs and must be assessed directly against each of the three plans. Rulemaking was necessary because the identification of costs which constitute direct costs "requires consideration of what is practical and reasonable." *Montana Schools Group,* Order on Appeal (June 16, 1995) at 23.

¶13 The record of the rulemaking proceedings which followed my June 16, 1995 Order reflects, on its face, a failure of the Department to conscientiously consider what costs may be reasonably and practically passed directly on to the three plans. Initially, the record reflects the Department's position that direct costs need not be identified and passed on by plan. That position was plainly contrary to the Court's 1995 Decision and Judgment.

¶14 Insofar as the record reflects any attempt to identify direct costs, the attempt was wholly inadequate. As I pointed out in the April 21, 1998 Order, the Department totally ignored obvious candidates for direct cost accounting. For example, it did not address whether it is practical and reasonable to directly allocate the salaries of its hearing officers to each plan based on the number of hours the hearing officers spend working on each

plan's cases. The possibility that those salaries might constitute a direct cost was specifically discussed in the 1995 Order, yet never mentioned in the Department's subsequent rulemaking proceeding.

¶15 The Department's motion for reconsideration provides further confirmation for my holding. In that motion, the Department points out that its new rules define direct costs in a manner which excludes **all** costs upon which the assessment is based. The definition is set forth in Rule 1 and provides:

> "Direct costs identifiable to a plan" means those costs that can be identified specifically with a particular program and also identified with an individual plan **without further allocation**. [Emphasis added.]

The Department points out that "no costs met that definition." (Department of Labor and Industry's Request for Amendment or Reconsideration at 7.) Under the Department's interpretation of the definition, the salaries of hearing officers are not direct costs because the hearing officers are not assigned to hear cases involving a single plan, therefore their salaries cannot be assessed "without further allocation."

¶16 Thus, by rule, the Department rendered irrelevant the inquiry the Court ordered it to undertake. The Department provided no explanation or rationale as to why it is impractical or unreasonable for hearing officers to track their time, or why it is impractical or unreasonable to allocate other costs which might be susceptible to similar tracking. It failed to provide any rationale or factual basis whatsoever for its blanket rule redefining direct costs.

III.

¶17 The Department argues that rulemaking does not require it to hold a contested case hearing, make findings of fact, and provide detailed explanations for its rules. I agree with that general proposition but I disagree that principal is violated by my Decision. While a rulemaking proceeding is not a contested case hearing, and formal evidence and proof is not required, the nature of the rulemaking under section 39-71-201, MCA (1991), requires the Department to establish *some sort of factual basis for its determination* as to what costs do and do not constitute direct costs. Otherwise, the Department is free to disregard and nullify the criteria set forth in section 39-71-201, MCA (1991).

IV.

¶18 Both parties have asked me to reconsider my determination that I should recuse myself from presiding at an evidentiary hearing. In light of my determination that there will be no evidentiary hearing, it is unnecessary for me to recuse myself.

V.

¶19 MSG continues to argue that the only relief the Court may order is a refund of the entire amount of the assessment it paid under protest in 1992. Taking the opposite view, the Department argues that even if the assessment is invalid the Court cannot order a refund. The arguments merit reexamination. I address the contentions in reverse order.

¶20 If the Court cannot order a refund, then the validity of the Department's rules is irrelevant and this whole proceeding is moot. But the Court has already ordered a refund. Paragraph 3 of the June 16, 1995 Judgment provides:

> After properly adopting a rule regarding assessment methodology, the Department shall recompute the Montana Schools Group's fees for 1992 and 1993 using the new methodology. If the fees are less than originally assessed, the Department shall either refund the difference or credit that difference to Montana Schools Group's obligations in future years.

(Order on Appeal at 28.) Neither party appealed the June 16, 1995 Judgment. That Judgment was final. While this Court retained "continuing jurisdiction to resolve any disputes which may arise in the carrying out of this judgment," that retention of jurisdiction did not make the judgment any less final. Neither party appealed. (*Id*.) Contrary to both parties' arguments, the judgment is the "law of the case" and binding. *State v. Woods,* 945 P.2d 918, 921 (Mont. 1997).

¶21 MSG's argument stands on different footings. As to MSG's assertion that the Department's failure to adopt a valid rule entitles it to a refund of the full amount assessed against it, that argument was rejected in the 1995 Decision and will not be reconsidered here. However, my prior Decision did not determine what relief MSG should be granted in the event the Department failed to comply with my rulemaking Order. Nor did it consider what relief should be afforded if the amount of MSG's direct costs for 1992 and 1993 cannot be determined.

¶22 At this late hour, it is unlikely, if not impossible, that the Department can retroactively determine and allocate direct costs. Therefore, I find that MSG shall be liable for only that part of the assessment which is based on indirect costs. The Department shall refund that portion of the assessment against MSG which is ultimately attributed to direct costs. In the event that the Department fails to adopt valid assessment rules following this remand, MSG shall be entitled to a full refund of its assessment payments.

VI.

¶23 MSG requests an award of attorney fees. Its request extends not only to fees incurred in connection with the post-rulemaking appeal but with respect to the original proceeding which resulted in the 1995 Decision.

¶24 MSG previously requested an award of attorney fees in connection with the 1995 Decision. That request was denied as untimely since MSG did not pray for attorney fees prior to the entry of judgment. The order denying the request was never appealed. Order Denying Attorney Fees (9/27/95); Order Denying Motion to Reconsider Order Denying Attorney Fees (10/4/95). The Orders were final, were not appealed, and would thus appear to be the law of the case.

¶25 Nonetheless, MSG has brought two cases to the Court's attention which indicate that it was unnecessary for it to specifically pray for attorney fees and that it may request such fees after the entry of a final judgment on the merits. In *Niles v. Carbon County,* 174 Mont. 20, 568 P.2d 524 (1977), the Montana Supreme Court held that where a statute provided for an award of attorney fees to a successful party in a tax deed case, the successful party could pursue attorney fees after judgment even though the party had not specifically requested the fees. In a more recent case, *Kelleher v. Board of Social Work Examiners and Licenced Professional Counselors*, 939 P.2d 1003 (Mont. 1997), the Supreme Court held that a post-judgment request for attorney fees in a case in which the district court had granted a writ of mandamus three and one-half years previous was not barred by laches since a statute governing attorney fees in mandamus actions plainly provided for the fees, therefore the defendant could not have possibly been prejudiced by the delay. *Id*.

¶26 I need not consider whether this case is distinguishable from *Niles* and *Kelleher* because, after reviewing the merits of the request, I find that attorney fees should not have, and should not be, awarded with respect to the first proceeding.

¶27 The cases cited in MSG's 1995 briefs regarding attorney fees indicate that there are three possible bases for an award of attorney fees. They are:

- an equitable doctrine applicable to "extreme cases" in which "justice and equity" require. *Weber v. Montana,* 253 Mont. 148, 154, 831 P.2d 1359, 1362 (1992);
- section 25-10-711, MCA, which allows attorney fees to be awarded against a governmental entity when the agency's defense is frivolous or pursued in bad faith. The statute states:

> (1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party,

whether plaintiff or defendant, is entitled to the costs enumerated in 25-10-201 and reasonable attorney's fees as determined by the court if:

(a) he prevails against the state, political subdivision, or agency; and

(b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

(2) Costs may be granted pursuant to subsection (1) notwithstanding any other provision of the law to the contrary.

- case precedents establishing a "private attorney general" theory for imposition of attorney fees.

¶28 The prior proceeding is not an "extreme case" requiring an award of attorney fees. At the time MSG filed its challenge to the assessment methodology, the assessment had been in place for many years and had never been challenged by any insurer subject to the assessment. The Department's defense of its existing methodology was not so unreasonable, capricious, or extreme as to warrant an imposition of attorney fees under this doctrine.

¶29 For the reasons stated in the previous paragraph, the original proceeding is also not a case which warrants a finding that the Department's defense of its assessment methodology was " frivolous or pursued in bad faith." Therefore, an award under section 25-10-711, MCA, is not warranted.

¶30 Thus, the only remaining basis for an award of attorney fees with respect to MSG's original 1992 challenge to the assessment is its "private attorney general" theory.

¶31 It is questionable whether the private attorney general theory is applicable at all. In the case of *In re: Dearborn Drainage Area,* 240 Mont. 39, 42, 782 P.2d 898, 899 (1998), the Supreme Court reversed an award of attorney fees by the Water Court where, "under the inherent equitable powers held by the judiciary," the circumstances for an award of fees did not arise to "extraordinary and compelling circumstances." Absent such extreme circumstances, the Court found that the only basis for awarding attorney fees was "the 'American Rule' regarding attorneys' fees. Under the American Rule, a party in a civil action is generally not entitled to fees absent a specific contractual or statutory provision." *Id*. While not adopting section 25-10-711, MCA, as the *exclusive* provision for an award of attorney fees against the State and its agencies, the Supreme Court clearly limited any non-statutory award to extraordinary circumstances. Although this does not foreclose the possibility that there may be some case which does not meet the "frivolous"

or "bad faith" test of section 25-10-711, MCA, which nonetheless meets the extraordinary circumstances test for an exercise of inherent judicial authority, it is difficult to imagine such a case. Certainly, this is not the case.

¶32 In the *Dearborn Drainage* case the Supreme Court did not adopt or reject the "private attorney general" doctrine, rather it found that it did not apply it in any event. In discussing the doctrine, the Court said:

The Doctrine is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens. In this case, the Department complied with its mandate and represented a public's interest as defined by Sec. 85-2-223, MCA, in making the in-lake claims at Bean Lake. There was no failure on its part to comply with its duties.

> We reiterate the point that the Department acted in good faith and in accordance with constitutional and statutory mandates in making its claims at Bean Lake. We therefore hold that the award was in error and the judgment awarding fees is reversed.

240 Mont. at 43, 782 P.2d at 900.

¶33 In *Weber* the Supreme Court rejected the application of the theory because the plaintiff was seeking personal damages against the State rather than a general vindication of claims for or against the State. *Weber*, 253 Mont. at 154, 831 P.2d at 1363. More importantly, the Court found that the State's defense of the case was supported by evidence and not frivolous.

¶34 The Department's original defense was not frivolous or in bad faith. The private attorney general doctrine is inapplicable. I therefore reaffirm my 1995 determination that MSG is not entitled to attorney fees with regard to its original petition.

VII.

¶35 The final matter remaining is MSG's entitlement to attorney fees with respect to the present enforcement proceeding. The criteria for any award of attorney fees are set out in the preceding section.

¶36 While I am loath to find that the Department's defense of its rules is frivolous or asserted in bad faith, I do find that this is an "extreme case" in which justice and equity require an award of attorney fees. The rulemaking proceeding did not comply with the 1995 Judgment. While the non-compliance may have been based on a honest misreading or misinterpretation of my Decision, MSG was forced to request this Court to enforce its

original Judgment. It is entitled to attorney fees with respect to this enforcement proceeding.

AMENDED JUDGMENT

¶37 The Judgment in this matter is amended to read as follows:

1. The assessment rules adopted by the Department effective August 5, 1997, are invalid, null and void.

2. This matter is remanded to the Department for further rulemaking proceedings to be conducted in compliance with this Court's decisions.

3. The Department shall complete its rulemaking proceeding within six months of the date of this Judgment**.**

4. The Department shall refund that portion of MSG's 1992 and 1993 assessments which is attributable to those costs which the Department hereinafter determines to be direct costs.

5. In the event the assessment rules adopted by the Department pursuant to this Judgment are subsequently determined to be invalid and void, the Department shall refund to MSG the entire amount of the 1992 and 1993 assessments.

6. MSG is not entitled to attorney fees with respect to its original appeal which resulted in this Court's 1995 decision.

7. MSG is entitled to attorney fees with respect to the present enforcement action. The amount of the attorney fees shall be determined after either the time for appeal of this Judgment has expired or the appeal has been decided and the case remanded to this Court. ARM 24.5.343.

8. This Court retains continuing jurisdiction to resolve any disputes which may arise in carrying out this Judgment.

9. This Judgment is certified as final for all purposes, including for purposes of appeal.

DATED in Helena, Montana, this 8th day of June, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Allan B. Chronister
Mr. Daniel B. McGregor
Date Submitted: May 13, 1998