IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MT WCC 31
WCC No. 9309-6893

MONTANA SCHOOLS GROUP WORKERS' COMPENSATION

RISK RETENTION PROGRAM

Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRY/
EMPLOYMENT RELATIONS DIVISION

Respondent.

ORDER REGARDING ASSESSMENT RULES

Summary: In 1992, Montana Schools Group Workers' Compensation Risk Retention Program (MSG) challenged the Department of Labor's assessment of $162,477.61 against it under section 39-71-201, MCA (1991), a statute requiring allocation of costs to the three workers' compensation plans identified by statute. The assessment was upheld by a hearing officer, but the WCC ruled that DOL's failure to adopt rules establishing an assessment formula invalidated the assessment formula it used. When the matter was remanded to the DOL, the DOL took two years to adopt rules, but the rule-making process did not involve real consideration of which costs could be directly allocated. MSG returned to the WCC to challenge the amount of assessment.

Held: Section 39-71-201, MCA (1991), and the Court's prior opinion required the DOL to engage in real consideration of which costs could be measured by plan and hence allocated directly among the three plans. The DOL failed to do this. The WCC rejects the DOL's argument that the Court should defer to its interpretation of section 39-71-201, MCA (1991), where the statute is not ambiguous and the DOL's interpretation is not consistent with statutory language. The rules adopted by the DOL are thus invalid. Since this matter arose, however, the legislature has amended section 39-71-201, MCA (1991), establishing a different method of cost allocation. Thus, further rule-making regarding the 1991 statutory system would be undertaken solely for this case. Further, the history of this matter makes return of the initial decision-making function on this case to the DOL improper. The WCC orders that a court shall hold an evidentiary hearing to determine cost allocation under section 39-71-201, MCA (1991). The WCC recuses itself from holding that hearing because its operation constitutes a potential cost item at the hearing and given the history of the Court's involvement in this litigation.

Topics:

Administrative Agencies: Rules: Rule Making. In this case involving insurer's challenge of assessment levied against it by Department of Labor, WCC held DOL failed to consider directive of section 39-71-201, MCA (1991), to consider allocation of direct costs when making rules. The rules were therefore invalid.

Courts: Recusal. In this case involving insurer's challenge of assessment levied against it by the Department of Labor, WCC held DOL failed to consider directive of section 39-71-201, MCA (1991), to consider allocation of direct costs when making rules. The rules were therefore invalid. The WCC had once before sent the matter back to the DOL for rule- making. Due to the fact that the Court's own operation was a potential cost at issue, and given the stance taken by the Court on the matter, the WCC recused itself from handling an evidentiary hearing ordered for determination of the method of assessment.

Statutes and Statutory Interpretation: Construing as a Whole. If possible, a statute must be construed in its entirety; words and phrases cannot be read in isolation. *Vita-Rich Dairy, Inc. v. Dept. of Business Regulation*, 170 Mont. 341, 348, 553 P. 2d 980, 984 (1976); *McClanathan v. Smith*, 186 Mont. 56, 62, 606 P. 2d 507, 510 (1980).

Statutes and Statutory Interpretation: No Meaningless Provisions. In construing a statute, the Court must give meaning and effect to all statutory provisions; a construction which renders a provision meaningless is disfavored. *Groves v. Clark*, 277 Mont. 179, 184, 920 P.2d 981, 984 (1986) ("It is well settled that this Court must give meaning and effect to all statutory provisions, and that a construction which renders a provision meaningless is disfavored.")

Statutes and Statutory Interpretation: Plain Meaning. The rule of deference to administrative interpretations, *see Christenot v. State Department of Commerce*, 272 Mont. 396, 401, 901 P.2d 545 (1995), applies only where the statute is ambiguous. If a statute is not ambiguous, it must be applied as written, even if an agency proffers a contradictory interpretation. If the intent of the legislature can be determined from the plain meaning of the words used in the statute, that plain meaning is controlling and the Court cannot nullify or modify it. *See, Hern Farms, Inc. v. Mutual Benefit Life Ins. Co*., 280 Mont. 436, 441, 930 P.2d 84, 87 (1996).

Introduction

¶1 This case is a continuation of a complaint lodged by the Montana Schools Group Workers' Compensation Risk Retention Program (MSG) with respect to the workers' compensation assessment levied on it in 1992. MSG was assessed $162,477.61. It paid the assessment under protest and on June 16, 1992, initiated a contested case

proceeding before the Department of Labor and Industry (Department). (DLI Record, June 16, 1992 letter of J. Dennis Moreen.)

¶2 MSG's challenge to the assessment was heard by a Department hearing officer on January 21, 1993. The hearing officer issued his decision on August 31, 1993, rejecting MSG's challenge.

¶3 MSG then appealed to this Court. The appeal was extensively briefed and argued, and finally submitted for decision on April 21, 1995. On June 16, 1995, this Court issued a decision and judgment holding that the Department's assessment formula was invalid because it had not been adopted through rulemaking. (Order on Appeal, June 16, 1995 [1995 Decision].) The decision did not nullify the amount of the assessment, rather it remanded the matter to the Department for a rulemaking proceeding, following which the Department was to compute MSG's assessment in compliance with the rules it adopted. (*Id.*) This Court expressly retained "continuing jurisdiction to resolve any disputes which may arise in the carrying out of this judgment." (*Id.* at 28.)

¶4 Neither party appealed the decision of this Court.

¶5 Following remand, the Department engaged in a rulemaking proceeding. Ultimately, it adopted rules incorporating its past assessment methodology. That process took over two years, culminating on August 5, 1997, with the adoption of rules. Under the adopted rules, MSG will be assessed the same amount for 1992 as it was originally assessed.

¶6 On August 27, 1997, MSG sought this Court's further review, alleging that the Department's rules did not comply with the Court's decision or section 39-71-201, MCA (1991).

Prior Decision

¶7 In this Court's prior decision, I determined that the Department must adopt an assessment methodology through rulemaking. (1995 Decision at 24.) I further determined that section 39-71-201, MCA (1991), which is the assessment statute, contemplates "some effort to determine what costs can be directly accounted for. At a minimum, the section requires the Department to determine what direct costs can be reasonably tracked." (*Id.* at 19.)

The Rulemaking Proceedings

¶8 An initial stab at rulemaking was initiated on June 10, 1996 with a Notice of Public Hearing on the Proposed Adoption of Five New Rules. That initial effort was abandoned and a new proceeding was initiated on February 10, 1997, with the publication of a Notice of Public Hearing on the Proposed adoption of Eleven New Rules.

¶9 A hearing on the second set of proposed rules was held on March 21, 1997. The testimony and comments made at the hearing were brief. The transcript of the entire

proceeding is 15½ pages, of which the first five pages set out the hearing officer's preliminary comments. Mr. Chuck Hunter provided background information concerning the proceedings themselves. Mr. Brian McCullough, who was responsible for the Department's budgeting and planning, also testified. In the *most* general of terms, Mr. McCullough discussed cost allocation and gave an opinion that the proposed rules efficiently and fairly allocated the assessment among the three plans. He did not address what costs meet or do not meet the definition of direct costs. His lack of specificity, and the Department's overall failure to determine which costs are direct costs, are critical to the resolution of MSG's request for judicial review of the rules.

Merits Discussion

¶10 The distinction in section 39-71-201, MCA (1991), between direct and indirect costs was critical to this Court's 1995 Decision. In that decision, I pointed out that the *direct costs* to which the statute refers "are costs which are **readily assignable** to a particular agency or program." (1995 Decision at 17, emphasis in original.) I further pointed out that the foregoing definition is consistent with the definitions provided by both the Department's accounting expert, Mr. McCullough, and MSG's accounting expert, Ms. Kathy Johnson. (*Id.*)

¶11 The definition was a central consideration in the 1995 Decision. I noted testimony by Mr. McCullough that the direct cost of a hearing officer who hears workers' compensation cases could be determined by accounting for the number of hours spent hearing cases for each plan. The percentage of time spent on each plan could then be used to expense the hearing officer's salary among the plans. (1993 Tr. at 52; 1995 Decision at 18.) There was nothing in Mr. McCullough's testimony to indicate that such an accounting measure would be inconsistent with "proper accounting and cost allocation procedures." *(Id.)* I went on to note that "such measure may, however, be impractical and increase agency costs, which would then be charged to the three plans." (*Id.* at 19.) That remark, in context, was no more or less than an acknowledgment that any determination concerning direct costs requires consideration of the practicality and cost-effectiveness.

¶12 Because the identification of direct costs required determination of "what costs can be directly accounted for," I ultimately concluded that section 39-71-201, MCA (1991), is not self-executing and requires specific, substantive rules to implement its intent. (*Id.* at 18-19.)

¶13 Notwithstanding my extensive discussion of direct costs, and the need to identify those costs, in this appeal the Department argues that section 39-71-201, MCA, "does not require that direct costs be attributed to the Plans individually, but rather that the direct costs be attributed to all plans collectively." (Department's Response Brief at 6.) It urges, therefore, that it is not required to identify the direct costs attributable to each of the separate plans. It cites extensive "historical perspective" for its argument.

¶14 "Historical perspective" cannot change express statutory requirements. Section 39-71-201, MCA (1991), on its face, requires the allocation of direct costs among the three different plans. It provides in relevant part:

> The assessments must be sufficient to fund the **direct costs identified to the three plans** and an equitable portion of the indirect costs based on the ratio of the preceding fiscal year's indirect costs distributed to the plans, using proper accounting and cost allocation procedures. Plan No. 3 must be assessed an amount sufficient to fund **the direct costs** and an equitable portion of the indirect costs of regulating plan No. 3.

¶15 The Department has focused on the language referring to "direct costs identified **to the three plans**" as indicating that the legislature did not intend for it to identify the direct costs of ***each*** plan. That focus ignores two fundamental rules of statutory construction. The first rule is that, if possible, a statute must be construed in its entirety; words and phrases cannot be read in isolation. *Vita-Rich Dairy, Inc. v. Department of Business Regulation*, 170 Mont. 341, 348, 553 P.2d 980, 984 (1976); *McClanathan v. Smith*, 186 Mont. 56, 62, 606 P.2d 507, 510 (1980). The second rule is that in construing a statute the Court must give meaning and effect to all statutory provisions; a construction which renders a provision meaningless is disfavored. *Groves v. Clark*, 277 Mont. 179, 184, 920 P.2d 981, 984 (1986) ("It is well established that this Court must give meaning and effect to all statutory provisions, and that a construction which renders a provision meaningless is disfavored.").

¶16 What is the purpose of the statutory directive that the Department identify and use direct costs in the assessment process if not to allocate those direct costs among the three plans? The Court can imagine none. Separating direct from indirect costs without allocating direct costs among the three plans would be pointless and would render the requirement for the identification of direct costs superfluous and meaningless.

¶17 Moreover, other language in the quoted portion of the statute indicates that direct costs must be allocated to the individual plans. While this statute does not initially say how direct costs are to be used in the assessment process, it specifically states that "indirect costs" are to be equitably distributed among the three plans. The "equitable" distribution requirement applies only to indirect costs. By implication direct costs attributable to each plan are to be assessed to each plan.

¶18 That implication is confirmed by a specific directive that "Plan No. 3 must be assessed an amount sufficient to fund **the direct costs** and an equitable portion of the indirect costs of regulating Plan No. 3." § 39-71-201, MCA (1991) (emphasis added). The requirement that direct costs attributable to Plan 3 (the State Fund) be allocated to Plan 3 conclusively refutes the Department's contention that section 39-71-201, MCA, does not require that direct costs be determined for each plan.

¶19 The Department argues that the Court must defer to its construction of section 39-71-201, MCA, "unless there are compelling indications that the construction is wrong."

(Department's Response Brief at 6.) *Christenot v. State, Dept. of Commerce*, 272 Mont. 396, 401, 901 P.2d 545 (1995) (citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1995)). However, the rule of deference set forth in *Christenot* was in the context of an admittedly ambiguous statute. In this case, the statute is not ambiguous. Since it is not ambiguous, it must be applied as written. If the intent of the legislature can be determined from the plain meaning of the words used in the statute, that plain meaning is controlling and the Court cannot nullify or modify it. See *Hern Farms, Inc. v. Mutual Benefit Life Ins. Co.*, 280 Mont. 436, 441, 930 P.2d 84, 87 (1996). Thus, there is a compelling indication that the Department's construction is wrong.

¶20 If the Department was relying on its interpretation of section 39-71-201, MCA (1991), in adopting the rules, then its rulemaking procedure did not comply with the statute. The statute requires that it identify and use direct costs in levying the assessment. Only those costs which do not meet the definition of direct costs may be classified as indirect costs and "equitably" assessed.

¶21 The Department argues that it nonetheless considered direct costs when adopting the rule but found, with the exception of the field hours of safety inspectors, it is impractical to identify specific costs to the three plans. It urges that to track specific costs by plan it would have to vertically integrate its functions or "require **all** personnel to record the amount of time (in small increments) spent on a given matter on a plan-by-plan basis." (Response to Comment 1.) It states that its current organization is more efficient and less costly than vertical integration. *(Id.)* It cites timekeeping examples for employees who handle large volumes of matters, such as data entry operators, and for management personnel, whose work may simultaneously affect a number of programs and plans. *(Id.)*

¶22 I find that the Department has not satisfied my original Order or section 39-71-201, MCA (1991), in its rulemaking proceeding. Except for safety inspections, which it was already tracking by plan on an hourly basis, it has taken an all or nothing stance with regard to direct costs. In doing so, it has failed to give consideration to particular costs which might be characterized as direct costs. Mr. McCullough testified in the 1993 hearing that it is possible to require hearing officers of the hearing unit to keep time records by plan and charge their salaries to the three plans based on the proportion of time spent on work for each plan. (1993 Tr. at 52.) In my 1995 Decision at page 19, I specifically noted that testimony as an example of a cost that might be a direct cost. I did not hold that it was or was not since a final conclusion requires a determination of whether such time keeping is practical and cost-effective. (*Id.*)

¶23 On remand the Department ignored obvious examples of costs that might be reasonably tracked in a direct cost-effective matter, choosing instead to focus on those that are plainly not practical or cost-effective. Apparently, my decision was not as clear as it should have been, so let me be clear now: Section 39-71-201, MCA (1991), requires the Department to identify what costs of regulation may be classified as direct costs and pass those costs directly on to the three plans. If time keeping by hearing officers is practical and cost-effective, then their salaries are a direct cost under the

definition provided by Mr. McCullough and adopted by this Court, and must be used to allocate the hearing officers' salaries among the plans. The same may be true with respect to other employees whose duties are such that it is reasonable and cost-effective for them to keep time records. Examples that come readily to mind are mediators and even my own time, which is part of the assessment for the Workers' Compensation Court. That is not to say that time keeping for those employees should be mandated and defined as a direct cost. It is to say that the possibility should have been fully explored.

¶24 Other costs may also be subject to direct allocation. For example, Mr. McCullough agreed that the number of photocopies made by the Department could be tracked for each plan. (1993 Tr. at 53.) Again, whether or not such tracking is practical and cost-effective must be determined.

¶25 Since the Department's rulemaking did not comply with section 39-71-201, MCA (1991), or my Order, it is invalid. The question remaining for decision is what remedy the Court should now fashion.

Remedy Discussion

¶26 In attempting to fashion a remedy, I have reviewed the functional areas used by the Department for assessment purposes. Initially, the Department has broken the assessment down into three broad governmental functions: (1) legal functions, (2) insurance compliance and (3) safety functions. Within each of those three functions, it has identified various cost centers, as follows:

Legal Functions

1. Workers' Compensation Court

2. Department Hearings Unit

Insurance Compliance

3. Administration/Clerical Support

4. Claims Management

5. Files Management

6. Accident Cataloging

7. Rehabilitation (Department of Labor)

8. Rehabilitation Panel (SRS)

9. Medical Regulation

10. Policy Compliance

11. Mediation

12. Subsequent Injury Fund Administration

Safety Functions

13. Safety Administration

14. Occupational Safety Statistics

15. Supplemental Data System

16. Loss Control

17. Mining Inspection

18. Boiler Inspection

(Department Ex. 19; 1993 Hearing.) As far as the Court can ascertain, MSG does not challenge the use of the functions or cost centers. The question which the Department failed to address is what cost centers, or costs within those centers, can be directly allocated on a practical and cost-effective basis.

¶27 Some cost centers already use a direct cost element for the assessment. Specifically, functions 16 through 18 are based on the actual field hours worked by the employees entrusted with those functions. It may prove to be true that none of the costs within other centers are direct costs. For example, if the cost center involves repetitive data entry from claim forms and employers' first reports, it is difficult to envision that time keeping is either practical or cost-effective, or that it is going to result in any significantly different allocation than counting the number of claims entered for each plan. Another example of cost centers not susceptible to direct cost allocation are centers involving general administrative overhead, for example items 3 and 13. On the other hand, it may also prove to be true that other cost centers, or at least some of the costs within those centers, can be directly tracked and allocated on a practical and cost-effective basis.

¶28 The task that remains, while it may be tedious, is to go through each of the cost centers and determine which, if any, costs satisfy the definition of direct costs. The Court rejects MSG's suggestion that it merely invalidate the rules and order a full refund of its 1992 assessment payment. Such remedy would nullify the assessment statute altogether, at least with respect to MSG's statutory obligation.

¶29 Two questions remain. The first is who shall make the determinations required by this Court's 1995 Decision and by the present decision. The Court is reluctant to return this case to the Department for further rulemaking for four reasons. First, it has been nearly **six** years since MSG initiated this case. That is far too long. Second, it took the Department over two years after this Court's rulemaking directive to adopt rules. That is far too long. Third, and in the meantime, the legislature has amended section 39-71-201, MCA, effective July 1, 1999. (1995 Montana Laws, ch. 385.) The amendment adopts an entirely new methodology based on benefits paid by insurers. By the time any new rulemaking proceeding ordered by this Court is completed, the new method of assessment will have taken effect, rendering the new rulemaking proceeding a useless act except with respect to this case. Fourth, the Department's advocacy with regard to the interpretation and application of section 39-71-201, MCA (1991), and its failure to conduct any factual inquiry into what costs meet the direct costs definition, raise questions concerning its impartiality in any further inquiry.

¶30 In light of the new legislation, the real question in this proceeding is what, if any, amounts should be refunded to MSG. Based on the four considerations recited above, I find that the matter should not be returned to the Department. Rather, I conclude that a Court should hold an evidentiary hearing to identify which costs are direct costs. If any costs are identified as direct costs, the Court will then determine whether and how those costs can now be allocated consistently with the statute. MSG is liable, in any event, for any portion of the assessment which is based on costs which are determined to be indirect costs.

¶31 The second question arises as a result of the answer to the first question. That question is whether it is appropriate for this Judge to preside over that further hearing. The Workers' Compensation Court is one of the cost centers in the assessment. In 1995 I asked the attorneys for the Department whether it was appropriate for me to decide the issue presented at that time. I raised that question anew after MSG petitioned this Court again in 1997. Both times both parties were satisfied that I could be impartial. Both times I was satisfied that I could be impartial.

¶32 The resolution I have reached in this case, however, changes the complexion of my continued role in this case. The practicality and cost effectiveness of keeping time records for court staff or the direct costing of other court expenses may become a factual issue in any further hearing. Therefore, I conclude that I should recuse myself from the further proceedings I am ordering.

ORDER AND JUDGMENT

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

¶34 2. The Court will hold an evidentiary hearing to determine what costs specified by section 39-71-201, MCA (1991), are direct costs within the meaning of the statute. It will

then determine a method for computing MSG's total assessment for 1992 in light of the direct costs identified.

¶35 3. 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 21st day of April, 1998.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Allen B. Chronister
Mr. Daniel B. McGregor
Date Submitted: December 26, 1997