

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 6

WCC No. 9710-7854

JACK J. O'BRIEN,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PINE HILL SCHOOLS,

Employer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Summary: After claimant filed a petition asserting that State Fund was not entitled to a subrogation interest in his third party recovery on a medical malpractice claim, State Fund moved for summary judgment, stating in its brief that it "has waived any claims of equitable subrogation." State Fund asked for dismissal of the petition, asserting no issue remains. Claimant argues against dismissal, asserting he is entitled to a statutory penalty or sanctions under Rule 11 of the Montana Rules of Civil Procedure.

Held: State Fund has waived and relinquished any subrogation right and may not later repudiate that decision. Claimant is not entitled to a penalty under section 39-71-2907, MCA (1991) because that penalty attaches only to unreasonable conduct relating to benefits. Here, the allegation is that State Fund caused a delay in release of third-party settlement proceeds with the goal of obtaining claimant's agreement to some or all of its subrogation claim. Where section 39-71-2914, MCA (1991) refers to delay in payment of "benefit," the insurer's conduct does not give rise to a penalty under section 39-71-2907, MCA (1991). However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11 applicable in workers' compensation cases, are a possibility under the facts of this case. State Fund's position on equitable subrogation, maintained in its response to petition, but abruptly dropped prior to trial, raises an prima facie issue as to whether the assertion of the subrogation interest in the response was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1991). Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2914, MCA (1991). Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Constitutions, Statutes, Regulations and Rules: Montana Rules of Civil Procedure: Rule 11. Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Attorneys: Sanctions. Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are

available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Estoppel and Waiver: Judicial Estoppel. In a motion for summary judgment, the insurer waived any right to claim subrogation in claimant's third-party recovery. When such a waiver is made in a judicial proceeding, the insurer is judicially estopped from asserting any subrogation right in a future proceeding. *See, Fiedler v. Fiedler*, 266 Mont. 133, 139, 879 P.2d 675, 679 (1994).

Penalties: Insurers. Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

Sanctions. Where section 39-71-2907, MCA, refers to unreasonable delay in payment of "benefits," insurer's conduct in causing delay in release of third-party settlement proceeds does not give rise to a statutory penalty. However, sanctions under section 39-71-2914, MCA (1991), a statutory version of Rule 11, are available in workers' compensation proceedings. Claimant may be entitled to sanctions where State Fund's assertion of "equitable subrogation" in claimant's recovery in a third-party malpractice case, maintained in its response to petition, but abruptly dropped prior to trial, raises a prima facie issue as to whether the assertion was well founded and in good faith. Because the facts on that issue are insufficiently developed, a briefing schedule and hearing on sanctions was set.

¶1 The petitioner/claimant (claimant) seeks a determination that the respondent, State Compensation Insurance Fund (State Fund), is not entitled to any subrogation interest in a medical malpractice settlement obtained by him. The petitioner also seeks attorney fees and "such additional relief as the court may deem appropriate."

¶2 The State Fund filed its response on November 21, 1997. In that response it asserted that it "is entitled to a subrogation interest" in the settlement.

¶3 Thereafter, on December 19, 1997, the State Fund filed a motion for summary judgment and a brief supporting the motion. The motion does not enlighten the Court as to the grounds for summary judgment, other than refer the Court to the brief. In its brief the State Fund states that it "has waived any claims of equitable subrogation" to the settlement proceeds and so notified the claimant on December 2, 1997. Based on the waiver, State Fund contends that the matter is resolved and requests the Court to enter judgment dismissing the petition.

¶4 Waiver is a voluntary and intentional relinquishment of a right. *McGregor v. Cushman/Mommer*, 220 Mont. 98, 112, 714 P.2d 536, 543 (1986). The State Fund has manifested its clear intention to waive any subrogation right it might have in the settlement proceeds at issue in this case. That waiver is binding upon it and may not be repudiated at a later time. *Molerway Freight Lines, Inc. v. Rite-Line Transp. Services, Inc.*, 273 Mont. 95, 103, 902 P.2d 9, 14 (1995). Moreover, since the waiver is made in a judicial proceeding, the State Fund is judicially estopped from asserting any subrogation right in any future proceeding. *Fiedler v. Fiedler*, 266 Mont. 133, 139, 879 P.2d 675, 679 (1994) ("The doctrine of judicial estoppel binds a party to his or her judicial declarations, and precludes a party from taking a position inconsistent with them in a subsequent action or proceeding."). Thus, the subrogation issue is moot and that claim must be dismissed. *Montana Power Co. v. Charter*, 173 Mont. 429, 432, 568 P.2d 118, 119 (1976).

¶5 The claimant urges, nonetheless, that the petition should not be dismissed in its entirety because he is entitled to a statutory penalty. He also asks that he be given an opportunity to seek Rule 11 sanctions.

¶6 The basis for claimant's penalty argument is *not* that the State Fund either failed to pay or unreasonably delayed benefits. To the contrary, he agrees that the benefits were paid. Rather, he urges:

Here, having paid the benefits, the State fund attempted to extort repayment of benefits, (i.e. they wanted their money back), holding up \$100,000 of the claimant's money for four months based on a subrogation theory for which there was no legal support.

(Petitioner's Brief in Response to State Fund's Motion for Summary Judgment [petitioner's brief] at 4.) It is the delay in releasing the *settlement proceeds*, caused by the State Fund's assertion of a subrogation right, which is the basis for his penalty request. (*Id.*)

¶7 Section 39-71-2907, MCA (1991), permits the Court to assess a penalty only with respect to **benefits** which are delayed or refused, providing in relevant part:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) The workers' compensation judge may increase by 20% the full amount of **benefits** due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay **benefits** but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant **benefits**, the insurer unreasonably delays or refuses to make the payments.

Whether or not the State Fund's assertion of a subrogation right was unreasonable, this Court's statutory authority under the penalty section is limited to delay of benefits. Since benefits were not delayed, the Court cannot impose a penalty.

¶18 Claimant also asserts that the Court should consider sanctioning the State Fund on account of the initial response it filed in this case. He bases his assertion on Rule 11 of the Montana Rules of Civil Procedure. Rule 11 provides in relevant part:

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS--

SANCTIONS Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Claimant urges that the assertion of the subrogation interest was not "warranted by existing law or a good faith argument for the extension, modification or reversal or [sic] existing law." (petitioner's brief at 4-5.)

¶19 The Montana Rules of Civil Procedure do not directly apply to this Court, which has its own rules. However, the legislature has by statute provided the Workers' Compensation Court with a Rule 11 equivalent. Section 39-71-2914, MCA, provides:

39-71-2914. Signing of petitions, pleadings, motions, and other papers -- requirements -- sanctions.

(1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.

(2) A party who is not represented by an attorney shall sign his petition, pleading, motion, or other paper and state his address.

(3) The signature of an attorney or party constitutes a certificate by him that:

(a) he has read the petition, pleading, motion, or other paper;

(b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;

(c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and

(d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

Under this section, the Court may impose sanctions, including an award of reasonable attorney fees, if the State Fund's assertion of a subrogation interest was not warranted by law and was beyond the pale of legitimate legal argument.

¶10 In urging this Court to allow him to prosecute his request for sanctions, claimant cites testimony of James McCluskey (McCluskey), a vice president of the State Fund, as evidence of the unreasonableness of the State Fund's subrogation position. According to petitioner's brief at pages 3 and 4, McCluskey testified at a deposition that:

(1) the subrogation statute (§39-71-414, MCA) does not apply; (McCluskey depo [sic], pgs. 28, 29)

(2) because the subrogation statute does not apply the concept of "made whole" is irrelevant; (McCluskey depo [sic], pg. 28)

(3) that in third party cases arising out of professional health care malpractice that the State Fund has an "equitable" subrogation lien which allows it to take all of a third party settlement, less fees; (McCluskey depo [sic], pgs. 29, 34).

(4) The State Fund had no legal authority of any nature (no statute, no supreme court decision, no state district court decision, or any federal statute) to support the contention that the State Fund was entitled to an equitable subrogation lien. (McCluskey depo [sic], pgs. 30, 31, 32).

(Petitioner's Brief at 3-4.) In its reply brief the State Fund cites a single case from Pennsylvania as supporting its subrogation theory, but it does not indicate how the case fits in with Montana's statutes governing subrogation or the constitutional provision governing full redress. Its response is inadequate for the Court to resolve the sanction request.

¶11 The factual information set out above, along with the abrupt waiver of the alleged subrogation interest, raise a *prima facie* issue as to whether the State Fund's assertion of a subrogation interest was well founded and made in good faith. Without further briefing concerning the legal basis upon which the State Fund asserted the interest, it is premature to either dismiss or grant the claimant's request for sanctions.

PARTIAL SUMMARY JUDGMENT

¶12 The claimant's request that the Court determine that the State Fund has no subrogation interest in settlement proceeds from a medical malpractice action is **moot** in light of the State Fund's express and unequivocal waiver of any such interest.

¶13 The claimant is not entitled to a penalty under section 39-71-2907, MCA.

¶14 The State Fund is not entitled to summary judgment with respect to the request for sanctions. The State Fund shall, however, within 10 days of this Order file a brief setting forth the legal basis, if any, for its assertion of a subrogation interest. The brief shall also explain its decision to then waive that interest and address claimant's contention that sanctions should be imposed. Claimant will have 10 days in which to file an answer brief. The State Fund will thereafter have 10 days in which to file a reply brief.

¶15 A hearing on the request for sanctions will be held in Billings during the week of April 27, 1998.

¶16 There shall be no further discovery in this case. The scheduling order is **vacated**.

DATED in Helena, Montana, this 10th day of February, 1998.

(SEAL)

\s\ Mike McCarer
JUDGE

c: Mr. Gene R. Jarussi
Mr. Charles G. Adams
Submitted: February 6, 1998