IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 53

WCC No. 9808-8041

IVAN G. WALKER (DECEASED)

JAMES H. WALKER

Petitioner

vs.

CREDIT GENERAL INSURANCE COMPANY

Respondent/Insurer for

TRIPP BROTHERS TRUCKING

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Worker severely injured in automobile accident brought suit against the State of Idaho for highway design defects. He recovered $400,000. The workers' compensation insurer negotiated with claimant's attorneys for a settlement of the insurer's subrogation interest in claimant's civil recovery. $49,021.56 was paid to the insurer as settlement of that interest. The settlement of the subrogation interest was not submitted to the Department of Labor for approval. After claimant's death, his personal representative sought to abrogate the settlement of the subrogation interest and recover the $49,021.56 for the estate.

Held: Under 39-71-414, MCA, an agreement to settle a subrogation interest does not become a compromise settlement unless approved by the Department of Labor. Trial is necessary to determine the amount of the insurer's subrogation interest, if any.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-414, MCA.** Under 39-71-414, MCA, an agreement to settle a subrogation interest does not become a compromise settlement unless approved by the Department of Labor.

Subrogation. Under 39-71-414, MCA, an agreement to settle a subrogation interest does not become a compromise settlement unless approved by the Department of Labor.

¶1 The petitioner in this case is the personal representative of the estate of Ivan G. Walker (Ivan). Ivan suffered severe injuries while driving a truck for his employer. Credit General Insurance Company (the insurer), insured Ivan's employer and has paid workers' compensation benefits.

¶2 Ivan brought a third-party action against the State of Idaho alleging a highway defect contributed to his accident. He settled his claim before trial for $400,000.00 and thereafter paid the insurer $49,021.56 in settlement of its subrogation claim. The payment was pursuant to an oral agreement with the insurer. The agreement was not submitted to nor approved by the Department of Labor and Industry.

¶3 Ivan's personal representative now seeks repayment of the $49,021.56, alleging that the insurer was not entitled to the payment because the settlement did not fully compensate claimant for his injuries, which included a closed head injury and a spinal cord injury resulting in paraplegia. The insurer contends that the agreement between itself and Ivan settled the matter and is binding on the personal representative.

Procedural History

¶4 On April 16, 1999, the parties filed a joint stipulation requesting a conference with the Court for the express purpose of determining whether a trial was necessary or whether the matter might be submitted upon briefs. Stipulation and Request for Pretrial Conference with the Court to Resolve Dispute over Statement of Issues and to Determine Whether a Trial Is Necessary or Whether the Matter Should Be Submitted on Briefs.[(1)] A conference was held on April 20, 1999, and with the assistance of counsel for the parties, I adopted the following procedure for resolution of the case:

- Initially, the parties will file a further stipulation of facts, attaching relevant documents, concerning the subrogation agreement. Most of the facts are already set out in the stipulation counsel filed in anticipation of the conference, but at least two additional documents need to be identified and submitted.
- The initial issue the Court must determine is whether the subrogation agreement was valid in absence of the approval of the Department of Labor and Industry and any formal, signed agreement. The parties shall file briefs concerning that issue, specifically addressing (1) whether Department approval was required; (2) if not, whether there was a valid agreement; and (3) if so, whether the approval may be dispensed with under the facts of this case. Respondent shall file the opening brief by May 3, 1999. Petitioner's answer brief is due May 17th and respondent's reply on June 1st.

- Reserved for future argument and consideration, if necessary, are other legal and factual issues, including whether the subrogation agreement, if valid, should be reopened for mutual mistake of fact or upon other grounds, and, if no valid agreement exists, what subrogation amount, if any, is due respondent.

(April 20, 1999 Minute Entry.)

¶5 Subsequently, the parties filed Stipulated Facts (docketed May 4, 1999) and briefs. The initial issue, as set forth in the second paragraph of the procedure, is now submitted for decision.

Stipulated Facts

¶6 The following facts are stipulated as uncontroverted for purposes of the issues raised:

> 1. IVAN G. WALKER, petitioner's decedent, sustained severe, permanent, and paralyzing injuries on June 19, 1993, while employed as a commercial vehicle driver for employer TRIPP BROTHERS TRUCKING OF MISSOULA, MONTANA.
>
> 2. IVAN G. WALKER's injuries included complete paraplegia due to a spinal cord injury, a closed head injury, and a left shoulder fracture involving the humeral head. These injuries caused IVAN G. WALKER to be confined to a wheel chair and suffer severe pain.
>
> 3. IVAN G. WALKER was rendered permanently totally disabled as the result of his industrial injury. He was 36 years of age on the date of his industrial injury. IVAN G. WALKER was born on June 6, 1957.
>
> 4. Following his injuries, IVAN G. WALKER brought a third party claim against the State of Idaho alleging that a highway design defect caused his injuries. He was represented by the Platis Law Firm of the State of Washington in his third party claim.
>
> 5. In a letter to the Platis Law Firm dated August 20, 1993, the insurer agreed to share in the costs of the investigation and discovery of the third party case against the State of Idaho.
>
> 6. As a result of the industrial accident, IVAN G. WALKER sustained damages in excess of $400,000.00.
>
> 7. On August 1, 1996, CREDIT GENERAL INSURANCE COMPANY, the insurer for Tripp Brothers Trucking, (via Jim Salsbury) sent a letter to the Platis Law Firm, demanding subrogation rights. (Exhibit A) That letter stated:
>
> > Please be advised that the above referenced file has been transferred to me for handling of the subrogation portion of this claim. It is my understanding

that your office is pursuing an action on behalf of our employee. Please be advised our office is asserting all subrogation lien rights provided by the State of Montana Workers' Compensation Statutes. Please contact our office prior to accepting any settlement in order to discuss resolution of our lien.

Per our recent discussion our total lien is $57,000. However, the expected payment for lifetime benefits is in excess of $500,000 which is very likely to be paid considering Mr. Walker's injuries. We would be willing to accept 33% of any third party settlement. Additionally, I am advised that Montana law allows us to take either a settlement or credit but not both. Therefore, we will accept a portion of the third party settlement, and continue to pay all workers' compensation benefits without interruption. If you have any questions regarding this correspondence, please contact the undersigned.

A similar letter was sent to the Platis Law Firm on October 23, 1996. (Exhibit B)

8. On or about December 16, 1996, IVAN G. WALKER'S third party claim was settled for the sum of $400,000 on a compromise basis due to liability issues.

9. On or about December 16, 1996, IVAN G. WALKER executed the following document : (Exhibit C)

Approval of Disbursement of Settlement

I, Ivan G. Walker, the "Client" herein, hereby approve the following disbursments [sic] to be made by my attorneys, Platis Law Firm out of the sum of Four Hundred Thousand Dollars ($400,000.00) which I received as a result of an accident that I was involved in on June 19,1993.

TOTAL SETTLEMENT CHECK RECEIVED **$400,000.00**

LESS

Attorney Fee: 33.30% $122,743.68

Costs Advanced by Attorney
(See Attached) $108,234.76

Total Costs Advanced by Attorney $108,234.76

Medical Bills Due and Owing . . . . . $ 49,021.56

$ 0.00

$ 0.00

Total Medical Bills Due and Owing . . . . . .$ 49,021.56

TOTAL COSTS AND BILLS **$280,000.00**

NET AMOUNT DUE TO IVAN WALKER **$120,000.00**

10. On or about December 16, 1996, the Claimant, by and through his attorneys, the Platis Law Firm, reached a compromise agreement with Credit General Insurance Company whereby the Claimant paid the sum of Forty-Nine Thousand Twenty-One Dollars and 56/100 ($49,021.56), in exchange for a waiver of the insured's subrogation lien.

11. At the time the subrogation agreement was negotiated, Jim Salsbury discussed the finalization of the agreement with the Platis Law Firm, and was told that the Platis Law Firm would take care of any necessary paperwork.

12. The settlement of insurer's subrogation claim was not submitted for approval by the Department of Labor.

13. The Platis Law Firm issued a check for $49,021.56 to the insurer on January 28, 1997. The check's memorandum read,"Full and Final Release & Discharge." (Exhibit D)

14. On January 22,1997, Dennis C. Wade of the Platis Law Firm sent insured the following letter: (Exhibit E)

> January 22,1997
>
> Mr. Jim Salsbury
> Subrogation Specialist
> CNA Insurance Companies
> P O Box 759
> Downers Grove, IL 60515-7059
>
> > RE: Our Client: Ivan Walker
> > Claim #: 347-1a-0514
> > Insured: TTC, Inc.
> > Date of Loss: 6/19/93
>
> Dear Jim:
>
> Pursuant to our telephone conversation this afternoon, we are enclosing our firm's check in the amount of #49,021.56 [sic]. It is our understanding that this amount represents payment in full on the subrogation lien rights asserted by CNA Insurance Companies and will not affect the ongoing workers compensation obligation to pay benefits.

Thank you again for your assistance and cooperation in this matter and if you should have any questions, please do not hesitate to give me a call.

Sincerely,

/s/ Dennis Wade
Denis [sic] C. Wade

DCW/cg
Enclosure: check #4138

15. On February 18, 1997, as a result of his severe pain and depression caused by the industrial accident, IVAN G. WALKER committed suicide.

16. JAMES H. WALKER is the personal representative of the Estate of IVAN G. WALKER, deceased.

17. IVAN G. WALKER, deceased, is survived by three (3) minor children: Ashley Marie Walker, Travis Lee Walker, and Justin Gale Walker.

18. The insurer is paying to the children of IVAN G. WALKER, benefits pursuant to MCA 39-71-721, as the result of a negotiated compromise settlement which has been approved by the Department of Labor.

19. The insurer has paid $500,000 in compensation benefits to IVAN G. WALKER and his beneficiaries as the result of his industrial injury of June 19, 1993. The insurer has paid $150,029.51 in medical benefits.

20. Dennis Wade of the Platis Law Firm in Lynnwood, Washington represented IVAN G. WALKER in the third party claim against the State of Washington. Dennis Wade is not licensed to practice law in the State of Montana.

21. JAMES H. WALKER, the Personal Representative of IVAN G. WALKER'S Estate has filed with the Workers' Compensation Court his petition to require insurer, CREDIT GENERAL INSURANCE COMPANY (CNS), to return the subrogation payment with pre-judgment interest.

Discussion

¶7 Based on the facts recited, there is no question that Ivan and the insurer reached and executed an agreement settling the insurer's claim for subrogation with respect to his $400,000 settlement. The unanswered question is whether Ivan's personal representative may now abrogate the agreement and seek reimbursement of the monies Ivan paid the insurer.

¶8 The starting point for the Court's analysis is section 39-71-414, MCA, which governs subrogation in workers' compensation matters. Claimant's accident occurred in June 1993,

while the 1991 version of the WCA was in effect. As relevant to the present controversy, section 39-71-414, MCA (1991), provided:

> **39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery. . . . .
>
> (4) An insurer may enter into compromise agreements in settlement of subrogation rights.
>
> (5) Regardless of whether the amount of compensation and other benefits payable under the Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative may stipulate the proportion of the third-party settlement to be allocated under subrogation. **Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department.**
>
> . . . .
>
> (7) Regardless of whether the amount of compensation and other benefits payable have been fully determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be allocated under subrogation. **Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department.** [Emphasis added.]

Subsections (5) and (7) were amended in 1997. As amended, the subsections presently read:

> (5) Regardless of whether the amount of compensation and other benefits payable under the Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative may stipulate the proportion of the third-party settlement to be allocated under subrogation. **Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation.** A dispute between the insurer and claimant concerning subrogation is a dispute subject to the mediation requirements of 39-71-2401.
>
> . . . .
>
> (7) Regardless of whether the amount of compensation and other benefits payable have been fully determined, the insurer and the claimant may stipulate the

> proportion of the third-party settlement to be allocated under subrogation. **Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation.** A dispute between the insurer and claimant concerning subrogation is a dispute subject to the mediation requirements of 39-71-2401. [Emphasis added.]

1997 Mont. Laws, ch. 172. The highlighted language is the language at issue. It is the same whether the 1991 or 1997 version of section 39-71-414, MCA, is applied.[(2)]

¶9 Where the language of a statute is plain and unambiguous, the Court's job is to simply apply the statute as written. § 1-2-101, MCA; *State ex rel. Cobbs v. Montana Dept. of Social and Rehabilitation Services,* 274 Mont. 157, 162, 906 P.2d 204, 207 (1995). On its face, the highlighted language is plain. It contemplates Department approval for any subrogation agreement and specifies that where approval is granted a subrogation agreement between the parties becomes a compromise settlement. By plain and necessary implication, an agreement not approved by the Department does not constitute a compromise settlement. "Where a statute directs that a thing may be done in one manner it ordinarily implies that it shall not be done in any other manner." *Fletcher v. Paige,* 124 Mont. 114, 118, 220 P.2d 484, 486 (1950). In *Fletcher* the statute in question permitted beer and malt liquor signs to be displayed at breweries and warehouses. The Court held that by implication the statute precluded signs in other places:

> In providing that signs advertising beer or malt liquor can be placed upon a brewery or premises where beer or malt liquor was lawfully stored or kept, it logically follows that beer cannot be advertised by signboard or billboards in any other place. This is merely an application of the familiar maxim of expressio unius est exclusio alterius.

Id.

¶10 The insurer strenuously urges that the agreement constitutes an enforceable contract. Assuming the agreement would be enforceable absent section 39-71-414, MCA, the section imposes an additional requirement which must be met and the parties have not met it. Citing *Hein v. Fox*, 126 Mont. 514, 254 P.2d 1076 (1953), the insurer also urges that the parties waived the approval provision by executing their agreement. *Hein* is a contract case in which the parties waived a provision of their original agreement. The approval provision at issue in this case was not a negotiated part of the parties' contract, it is a statutory requirement which must be met. It was not met, therefore the agreement does not constitute a compromise settlement cutting off the subrogation rights of either party.

¶11 Whether the insurer is entitled to subrogation in any amount is a question of fact. The insurer is not entitled to subrogation until the amount received by claimant from the third-party recovery plus the amounts received and to be received in workers' compensation

benefits exceed claimant's entire loss, including costs of recovery. *Zacher v. American Ins. Co.* 243 Mont. 226, 231, 794 P.2d 335, 338 (1990).

The stipulated facts show claimant's recovery as follows:

3rd Party Action (without deduction for attorney fees) $400,000.00

Workers' Compensation Benefits $500,000.00

Medical Benefits $150,029.51

TOTAL $1,050,029.51

His minimum loss is:

Damages **in excess of** $400,000.00

Attorney Fees and Costs $230,978.44

Medical bills paid by the State Fund $150,029.51

Medical bills paid out of settlement proceeds . . . . . .$ 49,021.56

TOTAL $830,029.51

While his **minimum loss** is less than his recovery, **actual loss** is the measure of subrogation. Therefore, a trial must be held to determine his actual loss and thereby determine the insurer's right to subrogation.

PARTIAL SUMMARY JUDGMENT

¶12 The subrogation agreement between the claimant and Credit General Insurance Company is not an enforceable compromise settlement and does not bar petitioner from recovering all or part of the payment made pursuant to the agreement.

¶13 A trial to determine the amount of the insurer's subrogation interest, if any, is necessary. A scheduling order setting the matter for trial will be issued separately.

DATED in Helena, Montana, this 24th day of August, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. Charles G. Adams
Date Submitted: June 3, 1999

1. The caption of the request merits an award for longest caption for a motion.

2. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986) and a host of other cases hold the substantive law in effect at the time of the claimant's injury applies in determining the claimant's entitlement to benefits. However, the procedural law in effect at the time of the determination applies. *Wolfe v. Webb*, 251 Mont. 217, 824 P.2d 240 (1992)*; State Compensation Mut. Ins. Fund v. Sky Country, Inc.,* 239 Mont. 376, 780 P.2d 1135 (1989). Since the requirement for Department approval is a continuous one, the Court need not determine whether the requirement is substantive or procedural, or which particular version of the WCA applies.