IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 19

WCC No. 2010-2596

MONTANA INSURANCE GUARANTY ASSOCIATION

Petitioner

vs.

MONTANA SUBSEQUENT INJURY FUND

Respondent.

ORDER DENYING PETITIONER'S APPEAL AND AFFIRMING DEPARTMENT DECISION

Summary: Petitioner appealed from a Department decision denying it summary judgment on the issue of whether it was entitled to reimbursement from Respondent in a case where an employee who was certified as vocationally handicapped suffered a subsequent injury. The Department held that the employer had failed to fulfill its affirmative duty to comply with § 39-71-906, MCA.

Held: Although Petitioner urges this Court to conclude that Respondent had an affirmative duty to contact the employer and request that the employer comply with § 39-71-906, MCA, the language of the statute does not support such a reading. The decision of the Department's hearing officer is affirmed.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-906.** The Subsequent Injury Fund did not have a duty to request the information sought by § 39-71-906, MCA, before the employer had a duty to submit the information to SIF.
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> **Subsequent Injury Fund.** The Subsequent Injury Fund did not have a duty to request the information sought by § 39-71-906, MCA, before the employer had a duty to submit the information to SIF.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-906. The plain terms of § 39-71-906, MCA, require an employer to advise the Department that it has hired or retained a worker certified as vocationally handicapped. The law places the burden on the employer to submit this information; it does not place the burden on SIF to contact the employer and request the information.

Subsequent Injury Fund. The plain terms of § 39-71-906, MCA, require an employer to advise the Department that it has hired or retained a worker certified as vocationally handicapped. The law places the burden on the employer to submit this information; it does not place the burden on SIF to contact the employer and request the information.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-906. The 60-day time limit of § 39-71-906, MCA, begins to run from the date the injured worker receives his certification as a vocationally handicapped person.

¶ 1 Petitioner Montana Insurance Guaranty Association (MIGA) appeals from a September 22, 2010, decision of the Department of Labor and Industry (Department), in which the Department denied MIGA's motion for summary judgment against Respondent Montana Subsequent Injury Fund (SIF).[1]

¶ 2 MIGA asserts on appeal that, based on the undisputed facts of this case and an appropriate interpretation of § 39-71-906, MCA, it is entitled to reimbursement because the Department erred as a matter of law by imposing obligations upon the employer that are not required by statute.

JOINT STATEMENT OF UNCONTESTED FACTS[2]

¶ 3 On January 4, 1993, Douglas Dodge sustained an industrial injury arising out of and in the course of his employment with Town Pump. Town Pump's workers' compensation insurer accepted liability for Dodge's injury. At the time of his injury, Dodge worked as a Project Manager. His position required some physical activity in the field but consisted primarily of office work.

[1] Notice of Appeal, Docket Item No. 1.

[2] Taken from the parties' Joint Statement of Uncontested Facts, found in Appellant's Initial Brief (Opening Brief), Docket Item No. 6, at 3-5, unless otherwise noted.

¶ 4 On January 30, 1995, Dodge returned to work. He was initially restricted to a four-hour shift.

¶ 5 On June 4, 1996, Dodge reached maximum medical improvement (MMI) and was released to return to full-time employment at Town Pump, with a lifting restriction of thirty pounds. Dodge later returned to a modified, full-time position with Town Pump that was consistent with his permanent lifting restrictions.

¶ 6 As of June 4, 1996, Dodge was no longer eligible for temporary partial disability (TPD) benefits. However, Dodge had a permanent partial disability (PPD) entitlement with a fifteen percent whole person impairment award and a permanent lifting restriction.

¶ 7 On September 4, 1996, the parties settled Dodge's PPD entitlement.

¶ 8 On September 23, 1996, Dodge applied for certification as vocationally handicapped with SIF, citing that lifting restrictions for his lower back injury could make it difficult to find future employment. Dodge listed Town Pump as his current/permanent employer on the application and noted that he currently worked in a modified office management position to accommodate his impairment.

¶ 9 On October 28, 1996, the Department sent Dodge a letter, certifying him as vocationally handicapped with SIF. In the certification letter, the Department notified Dodge that he must present his certification card to prospective employers. The letter also provided, "[E]mployers are required to file the attached form with the Division within 60 days of hiring or rehiring." This is the only known correspondence sent by the Department concerning Dodge's application for, and certification as, a disabled worker with SIF.

¶ 10 On or about August 8, 2000, Dodge sustained an industrial injury arising out of, and in the course of, his employment with Town Pump. At the time of this injury, Fremont Indemnity Company (Fremont) insured Town Pump for workers' compensation.

¶ 11 After Dodge's August 8, 2000, industrial injury, Fremont became insolvent. MIGA assumed liability for Dodge's claim pursuant to the provisions of the Montana Insurance Guaranty Association Act. MIGA has paid Dodge appropriate compensation and medical benefits.

¶ 12 More than 104 weeks have passed since Dodge's August 8, 2000, industrial injury, and MIGA has paid more than 104 weeks of compensation benefits to Dodge.

¶ 13 On February 18, 2008, MIGA initially requested reimbursement from SIF pursuant to § 39-71-905(2), MCA.

¶ 14 On March 21, 2008, SIF denied MIGA's request for reimbursement because SIF did not have a Certificate of Employment on file from Town Pump. SIF maintains that § 39-71-906, MCA, requires that an employer file a Certificate of Employment before SIF can honor a reimbursement request.

¶ 15 MIGA obtained a copy of the file SIF maintains. SIF did not ask Town Pump for a Certificate of Employment. After determining that SIF had not requested a Certificate of Employment from Town Pump, MIGA made additional requests for reimbursement. SIF also denied those requests.

¶ 16 Based on SIF's continued denial of MIGA's request for reimbursement, MIGA filed its Petition for Contested Hearing on January 15, 2010, alleging that it is entitled to reimbursement from SIF, pursuant to § 39-71-905(2), MCA.

THE CONTESTED CASE HEARING

¶ 17 In his Summary Judgment Order, the hearing officer set forth the following issue:

> The question addressed in this order is whether MIGA is precluded from reimbursement for some of the benefits it has paid to the worker (and may pay in addition in the future) because of the absence of the Certificate of Employment in the files of the department's Montana Subject [sic] Injury Fund (SIF).[3]

¶ 18 He further explained:

> More specifically, MIGA seeks summary judgment that because SIF neither asked the employer for nor sent to the employer such a certificate to be completed and returned, the absence of the certificate is irrelevant to MIGA's reimbursement right. SIF opposes the motion, and argues that the absence of the certificate precludes any such reimbursement as a matter of law.[4]

[3] Summary Judgment Order at 1, attached as Exhibit A to Notice of Appeal, Docket Item No. 1.

[4] *Id*.

¶ 19 After considering the stipulated facts submitted by the parties, the hearing officer concluded that the statute at issue[5] did not impose a duty upon SIF to furnish the appropriate notification form to the employer before the employer would have an affirmative responsibility to file the notification form with SIF.[6] The hearing officer found that from the facts stipulated to by the parties, it was clear that Town Pump never filed a notification of employment or retention with SIF. He reasoned, "It makes no sense to read the statute to require action by SIF as a precondition to the employer's affirmative responsibility to file the notification."[7] The hearing officer denied MIGA's motion for summary judgment and concluded that, as a matter of law, MIGA's failure to file the notification of employment or retention either within 60 days of certification or before the subsequent injury precludes MIGA's reimbursement.[8]

ISSUE ON APPEAL

¶ 20 MIGA presents the following issue on appeal, as restated by this Court:

> Whether the Department Hearing Examiner erred when he denied summary judgment in MIGA's favor and held that SIF was not required to reimburse MIGA for payments it made regarding Dodge's August 8, 2000, industrial injury.

STANDARD OF REVIEW

¶ 21 The Workers' Compensation Court reviews the Department's decisions under the standards of review set forth in the Montana Administrative Procedure Act.[9] In the present case, the hearing officer made no findings of fact since the parties submitted the case for review on stipulated facts. Therefore, on appeal, the only matter for review is whether the hearing officer correctly applied the law to those facts. The appropriate standard of review is to determine whether the hearing officer's conclusions of law are correct.[10] Under § 2-4-704(2)(a)(iv), MCA, this Court will reverse the Department's

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[5] Although the hearing officer identifies the pertinent statute as "§ 39-71-206, MCA," in the Summary Judgment Order, this appears to be a typographical error and the statute which he and the parties contemplated is in fact § 39-71-906, MCA.

[6] Summary Judgment Order at 3.

[7] Summary Judgment Order at 4.

[8] Summary Judgment Order at 5. Although the hearing officer referred to the failure as MIGA's, as the parties' uncontested facts stipulate, it was actually the now-insolvent insurer, Fremont Indemnity Company, who failed to file the notification and MIGA assumed liability for this matter after Dodge's industrial injury.

[9] *Dahl v. Uninsured Employers' Fund*, 1999 MT 168, ¶ 10, 295 Mont. 173, 983 P.2d 363.

[10] *Steer, Inc. v. Dep't of Revenue of the State of Mont.*, 245 Mont. 470, 803 P.2d 601 (1990); *Zimmerman, et al. v. Uninsured Employers' Fund, et al.*, 1997 MTWCC 60.

decision if it is based on an incorrect conclusion of law that prejudices the substantial rights of an appellant.[11]

DISCUSSION

¶ 22 This case is governed by the 1991 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Dodge's industrial accident.[12] During oral argument, MIGA alleged that the parties and the hearing officer were uncertain whether the 1993 or 1995 version of the WCA applied in this instance, but that it was ultimately irrelevant which year of the statute was used because the language of § 39-71-906, MCA, remained the same in those years. From my review of the case as presented, I have not found why the parties and the hearing officer believed that the correct version of the WCA to apply in this matter was any other than the version in effect at the time of the industrial injury. Therefore, I have followed the longstanding rule that the date of the industrial accident controls in this instance and have used the 1991 WCA in this decision.

¶ 23 MIGA contends that the hearing officer erred when he concluded that Town Pump had a legal obligation to file a certificate of employment with SIF under § 39-71-906, MCA. MIGA further argues that in addition to misinterpreting the law, the hearing officer also failed to appreciate certain facts in this case. MIGA contends that SIF had notice of Dodge's employment at Town Pump and SIF had informed Dodge only that he needed to present his certification card to prospective, and not current, employers. MIGA further contends it would have been impossible for Town Pump to comply with the 60-day time limit found in § 39-71-906, MCA, under the facts of this case.[13]

¶ 24 Section 39-71-906, MCA, provides:

> Upon commencement of employment or retention in employment of a certified vocationally handicapped person, the employer shall submit to the department, on forms furnished by the department, all pertinent information requested by the department. The department shall acknowledge receipt of the information. Failure to file the required information with the department within 60 days after the first day of the vocationally handicapped person's employment or retention in employment precludes the employer from the protection and benefits of this part unless the information is filed before an injury for which benefits are payable under this part.

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[11] *Citizens Awareness Network v. Mont. Bd. of Envtl. Rev.*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583.

[12] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[13] Notice of Appeal at 2.

¶ 25 At issue is whether, under § 39-71-906, MCA, Town Pump was obligated to submit information to SIF or if SIF had the burden of first expressly requesting the information from Town Pump. MIGA argues, "If the Department does not ask the employer to submit any pertinent information, the employer has no obligation to submit any information at all, much less know what information to submit."[14]

¶ 26 As noted above, the Department hearing officer disagreed, concluding that under § 39-71-906, MCA, SIF had no such duty. For the reasons set forth below, I have concluded that the hearing officer correctly interpreted the applicable law and correctly concluded that SIF did not have a duty to request the information before Town Pump had a duty to submit the information to SIF in accordance with § 39-71-906, MCA.

¶ 27 The parties raise the question as to whether, when Town Pump retained Dodge in its employ after Dodge received his certification from SIF, Town Pump then had an obligation to seek out, complete, and file the specified forms, or whether SIF first had a duty to request that Town Pump provide SIF with the specified information. MIGA contends that § 39-71-906, MCA, does not obligate the employer to file this information until SIF specifically requests it.[15] MIGA argues that § 39-71-906, MCA, only obligates an employer to "submit . . . pertinent information requested by the department," and in this case, the Department did not request any information from Town Pump. MIGA therefore argues that because SIF did not request any information from Town Pump, its refusal to reimburse MIGA for Town Pump's failure to file a Certificate of Employment is "wrongful as a matter of law."[16]

¶ 28 MIGA further argues that in this specific instance, SIF knew that Dodge was working for Town Pump because Dodge had listed Town Pump as his employer when he filed his application for certification as vocationally handicapped under § 39-71-905, MCA.[17] It is undisputed that Dodge applied for and obtained certification as a vocationally handicapped person in 1996. At the time he obtained the certification, he had returned to work for Town Pump, in whose employ he had suffered the original 1993 industrial injury.[18] MIGA argues that notice to SIF was effectively given when Dodge filed his application for certification in which he noted that he was currently employed by Town Pump. MIGA argues that SIF knew even prior to certifying Dodge that he had been retained as an employee by Town Pump.[19] MIGA argues that in spite

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[14] Opening Brief at 6.

[15] *Id.*

[16] *Id.*

[17] Opening Brief at 7.

[18] *See* Joint Statement of Uncontested Facts, above.

[19] June 23, 2011, Oral Argument.

of this knowledge, SIF sent a certification letter to Dodge and enclosed the pertinent form with Dodge's letter, rather than sending the form to Town Pump. However, the certification letter instructed Dodge only that he needed to ask ***prospective*** employers to fill out and file the form with SIF; the letter did not instruct Dodge to give the form to his ***current*** employer.[20]

¶ 29 In response, SIF relies upon *St. Paul Fire and Marine Ins. Co. v. Subsequent Injury Fund*,[21] in which this Court interpreted § 39-71-906, MCA (1989). In *St. Paul Fire and Marine Ins. Co.*, this Court found that § 39-71-906, MCA, sets forth the condition employers must satisfy to obtain the "protection and benefits" of SIF provisions.[22] In that case, SIF certified the injured worker, but no one notified his subsequent employer about certification. Since the employer was unaware that the worker had an SIF certification, it did not provide SIF with the information required by § 39-71-906, MCA, prior to the worker's subsequent industrial injury.[23]

¶ 30 In fact, the injured worker in *St. Paul Fire and Marine Ins. Co.* had lied to his subsequent employer and indicated that he had never received treatment for a back condition or injury, and that he had no physical limitations which would affect his job performance.[24] In spite of the injured worker's misrepresentations to his employer, and representations to the Court that the subsequent employer would have availed itself of SIF's protections if it had known its employee was certified as vocationally handicapped, this Court concluded that SIF was not required to assume liability for the subsequent injury because the plain terms of § 39-71-906, MCA, require an employer to advise the Department within 60 days of employment or prior to an injury that it has hired a worker certified as vocationally handicapped.[25]

¶ 31 MIGA attempts to distinguish *St. Paul Fire and Marine Ins. Co.*, arguing that in *St. Paul Fire and Marine Ins. Co.*, the issue was whether the notice requirement of § 39-71-906, MCA, should be equitably tolled, or alternatively whether SIF should be estopped from asserting the 60-day notice provisions, while the present issue is "whether SIF can fail to satisfy its statutory obligation to request pertinent information . . . then successfully deny MIGA's request for the benefits and protections of [SIF]"[26] However, regardless of the precise legal theories the parties have relied on in these

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[20] Opening Brief at 6.

[21] *St. Paul Fire and Marine Ins. Co. v. Subsequent Injury Fund*, 1998 MTWCC 10.

[22] *St. Paul Fire and Marine Ins. Co.*, ¶ 10.

[23] *St. Paul Fire and Marine Ins. Co.*, ¶ 11.

[24] *St. Paul Fire and Marine Ins. Co.*, ¶ 12.

[25] *St. Paul Fire and Marine Ins. Co.*, ¶ 16.

[26] Appellant's Reply Brief, Docket Item No. 13, at 6.

cases, the application of § 39-71-906, MCA, to the cases' respective facts remains the same: as this Court held in *St. Paul Fire and Marine Ins. Co.*, the plain terms of § 39-71-906, MCA, require an employer to advise the Department that it has hired or retained a worker certified as vocationally handicapped. While this may seem unfair, the law nonetheless places the burden on the employer to "submit to the department, on forms furnished by the department, all pertinent information requested by the department." The statute does not place the burden on SIF to contact the employer and request the information. As the hearing officer correctly noted in the Summary Judgment Order:

> It makes no sense to read the statute to require action by SIF as a precondition to the employer's affirmative responsibility to file the notification. If that was the Legislature's intent, the 60 days for filing would necessarily start when SIF took the requisite action, and not on the first day of the employment or retention of the worker after vocational certification.[27]

¶ 32 SIF further responds that although the statutes pertaining to SIF are written as if the vocationally handicapped worker's employer benefits from SIF, in reality the employer's insurer benefits. SIF explained that each vocationally handicapped worker decides whether he wants to disclose his certification status to employers or prospective employers. For this reason, SIF provides the certification form to the worker when the worker receives his certification as a vocationally handicapped worker and the worker then decides whether to disclose his status and submit the form to his employer.[28] SIF contends that § 39-71-906, MCA, cannot reasonably be read to impose an affirmative duty on SIF to send a letter to an employer upon the hiring or retention of a certified worker because SIF has no way of knowing that the employment has occurred. Therefore, SIF provides the form to the worker, since the worker is in a position to know the identity of his new or continued employer.[29]

¶ 33 However, MIGA notes that in this instance, SIF had effective notice of Dodge's employment when he disclosed his current and permanent employer on his certification application.[30] MIGA contends that the purpose of § 39-71-906, MCA, was satisfied via Dodge's certification application.[31] MIGA argues that Town Pump was not required to give notice of Dodge's employment because "[t]he law does not require redundancy," and the Department already knew that Dodge worked for Town Pump because Dodge

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[27] Summary Judgment Order at 4.

[28] Oral Argument.

[29] *Id.*

[30] Appellant's Reply Brief at 10.

[31] Oral argument.

noted this on his application for certification.[32] However, I do not see how one can impute the knowledge of Dodge's ongoing employment to SIF; SIF would have known that Dodge remained employed at Town Pump on the day he received his certification. Until Town Pump notified SIF that it now had a certified worker (Dodge) in its employ, SIF could not have known that Dodge remained employed at Town Pump. The fact that Dodge worked for Town Pump on the day he applied for certification does not necessarily mean that he remained employed at Town Pump thereafter.

¶ 34 Finally, MIGA argues that the hearing officer's interpretation of § 39-71-906, MCA, would have made it impossible for Town Pump to comply with the technical requirements of the statute because Dodge had already worked for Town Pump for more than 60 days at the time that he received his certification as a vocationally handicapped worker.[33] This argument is incorrect. The 60 days did not begin to run from the date Dodge began to work for Town Pump; the 60 days began to run from the date Dodge received his certification as a vocationally handicapped person. Nothing in the facts presented to this Court indicates that it would have been impossible for Town Pump to comply with § 39-71-906, MCA, within 60 days of the date Dodge received his certification.

¶ 35 Under § 39-71-906, MCA, an employer must notify SIF that it has a certified worker in its employ in order to receive the protections and benefits of the statute. SIF need not send – and an employer need not wait for – a request for information regarding the certified worker. Here, Town Pump did not notify SIF that it had a certified worker in its employ before the worker sustained a subsequent industrial injury. The Department imposed only those obligations found in the statute.

¶ 36 I conclude that the hearing officer's conclusions of law are correct. For the reasons discussed above, the decision of the Department's hearing officer is affirmed.

ORDER

¶ 37 MIGA's appeal of the Department's Summary Judgment Order is **denied**.

¶ 38 The Department's order is **affirmed**.

¶ 39 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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[32] Reply Brief at 7-8.

[33] Opening Brief at 9.

DATED in Helena, Montana, this 12th day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kelly M. Wills
Mark Cadwallader
Submitted: June 23, 2011