IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 17

WCC No. 2013-3216R1

CRISTITA MOREAU, individually and as Personal Representative of the Estate of Edwin Moreau

Petitioner

vs.

TRANSPORTATION INSURANCE CO.

Respondent/Insurer.

ORDER DENYING MOTION TO BE JOINED OR INTERVENE

Summary: The decedent's employer moved to be joined under M.R.Civ.P. 19 and 20, or to intervene under M.R.Civ.P. 24, arguing that it had an interest in the litigation because it already paid the decedent's medical bills via an entity it had funded and because it has agreed to indemnify Respondent/Insurer for any occupational disease benefits Respondent/Insurer pays. It argues it would be forced to pay the decedent's medical benefits twice if Petitioner prevails. Petitioner argues that the employer cannot be liable for occupational disease benefits and that this Court has no jurisdiction to resolve a contract dispute between the employer and Respondent/Insurer if a dispute arises over the indemnity agreement.

Held: The employer's motion to be joined or to intervene is denied. Respondent/Insurer is the only entity that can be liable for occupational disease benefits. While the decedent's medical bills were paid by an entity that the employer funded and while the employer has agreed to indemnify Respondent/Insurer, neither the amounts the employer paid to fund the entity, the payments the entity made, nor the amounts that the employer might be required to pay under its indemnity agreement are "medical benefits" under § 39-71-704, MCA. The employer's interests are secondary and arise from a separate agreement with the Respondent/Insurer, which is outside of this Court's jurisdiction. The employer's interests are aligned with Respondent/Insurer's, which has and continues to vigorously defend this case.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. An employer who obtained insurance under Plan No. 2 is not an "insurer" under § 39-71-116(9), MCA, and cannot be liable for benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2203. Under § 39-71-2203, MCA, an insurer's duty to pay benefits is nondelegable. The Court reject an employer's unsupported argument that it could circumvent this statutory language by agreeing to indemnify its insurer.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Section 39-71-704, MCA, places the responsibility to pay medical benefits solely on the insurer and does not state that an entity other than the insurer can pay medical benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 19. Persons whose interests are one step removed from the issue in the case are neither necessary nor indispensable parties under M.R.Civ.P. 19. Therefore, an employer insured under Plan No. 2 is neither necessary nor indispensable even though the employer entered into an agreement to indemnify its insurer. An insurer's duty to pay benefits is nondelegable.

Procedure: Joining Third Parties. Persons whose interests are one step removed from the issue in the case are neither necessary nor indispensable parties under M.R.Civ.P. 19. Therefore, an employer insured under Plan No. 2 is neither necessary nor indispensable even though the employer entered into an agreement to indemnify its insurer. An insurer's duty to pay benefits is nondelegable.

Employers: Joinder. Persons whose interests are one step removed from the issue in the case are neither necessary nor indispensable parties under M.R.Civ.P. 19. Therefore, an employer insured under Plan No. 2 is neither necessary nor indispensable even though the employer entered into an agreement to indemnify its insurer. An insurer's duty to pay benefits is nondelegable.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 19. An employer insured under Plan No. 2 does not have an interest in a workers' compensation case because it is not and cannot be liable for the benefits sought. The Court can provide complete relief between the estate of the injured worker and the insurer and the employer is not a necessary or indispensable party under M.R.Civ.P. 19.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 20. An employer insured under Plan No. 2 does not have an interest in a workers' compensation case because it is not and cannot be liable for the benefits sought. The Court can provide complete relief between the estate of the injured worker and the insurer and even though the employer agreed to indemnify the insurer, it is not jointly or severally liable for benefits and is therefore not a proper party under M.R.Civ.P. 20.

Procedure: Joining Third Parties. An employer insured under Plan No. 2 does not have an interest in a workers' compensation case because it is not and cannot be liable for the benefits sought. The Court can provide complete relief between the estate of the injured worker and the insurer and even though the employer agreed to indemnify the insurer, it is not jointly or severally liable for benefits and is therefore not a proper party under M.R.Civ.P. 20.

Employers: Joinder. An employer insured under Plan No. 2 does not have an interest in a workers' compensation case because it is not and cannot be liable for the benefits sought.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905. Where the employer is insured under Plan No. 2 but agreed to indemnify the insurer for benefits paid, this Court has no jurisdiction over the employer's contract interest in the case. Section 39-71-2905, MCA, grants jurisdiction to claimants and insurers who have a dispute concerning benefits and does not extend to contractual agreements such as the one at issue here.

Jurisdiction: Workers' Compensation Court: Generally. Where the employer is insured under Plan No. 2 but agreed to indemnify the insurer for benefits paid, this Court has no jurisdiction over the employer's contract interest in the case. Section 39-71-2905, MCA, grants jurisdiction to

claimants and insurers who have a dispute concerning benefits and does not extend to contractual agreements such as the one at issue here.

Jurisdiction: Workers' Compensation Court: Generally. Even where an employer has agreed to indemnify its workers' compensation insurer for benefits paid, this Court lacks jurisdiction to issue a judgment for benefits directly against an employer who is insured under Plan No. 2.

Benefits: Medical Benefits: Generally. Where an employer funded an entity which in turn paid medical bills of Libby residents affected by asbestos, regardless of their employment status, neither the employer nor the entity can be said to have paid "benefits" within the meaning of the WCA.

Employers: Liability. Where an employer funded an entity which in turn paid medical bills of Libby residents affected by asbestos, regardless of their employment status, neither the employer nor the entity can be said to have paid "benefits" within the meaning of the WCA. Even though the employer also agreed to indemnify its workers' compensation insurer for benefits paid, any amount it pays to the insurer will be to fulfill a contractual agreement and will not be the payment of workers' compensation benefits.

Employers: Joinder. The Court held that no risk of inconsistent obligations exists if an employer was not joined in a case in which the employer agreed to indemnify its insurer for benefits paid. If a dispute over this indemnification arose, the Court would not have jurisdiction to resolve such a dispute.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 24. Where an employer knew about a dispute for over a year prior to moving to intervene, the Court held that its motion was untimely.

Procedure: Intervention. Where an employer knew about a dispute for over a year prior to moving to intervene, the Court held that its motion was untimely.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 24. The Court denied an employer's motion to intervene where the Court determined that the employer's interests were aligned with its insurer's and that the insurer was adequately representing the employer's interests.

Procedure: Intervention. The Court denied an employer's motion to intervene where the Court determined that the employer's interests were aligned with its insurer's and that the insurer was adequately representing the employer's interests.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by Section: Rule 24. The Court denied an employer's motion to intervene where the Court could not determine whether the employer's involvement would delay the case. Although the employer argued that Petitioner's contention that it would cause delay was "speculative," as the moving party, the employer had the burden of proving that its intervention would not result in delay, and it failed to do so here.

Procedure: Intervention. The Court denied an employer's motion to intervene where the Court could not determine whether the employer's involvement would delay the case. Although the employer argued that Petitioner's contention that it would cause delay was "speculative," as the moving party, the employer had the burden of proving that its intervention would not result in delay, and it failed to do so here.

¶ 1 W. R. Grace & Co.-Conn. ("W.R. Grace") moves to be joined or to intervene in this case.[1] Petitioner Cristita Moreau, individually and as Personal Representative of the Estate of Edwin Moreau (Moreau), opposes W.R. Grace's motion.[2] Respondent Transportation Ins. Co. (Transportation) has not taken a position.

Background

¶ 2 Edwin Moreau (Edwin) contracted an asbestos-related occupational disease arising out of his employment with W.R. Grace, which resulted in his death.[3] Transportation, which insured W.R. Grace under Plan No. 2 of the Workers' Compensation Act (WCA), accepted liability and paid benefits.[4] However, Transportation

---

[1] Respondent/Intervenor W. R. Grace's Motion to be Joined and, Alternatively, to Intervene with Supporting Brief (Opening Brief), Docket Item No. 14; Respondent/Intervenor W. R. Grace's Reply Brief in Support of Motion to be Joined and, Alternatively, to Intervene (Reply Brief), Docket Item No. 23.

[2] Petitioner's Response to W.R. Grace's Motion for Intervention/Joinder (Response Brief), Docket Item No. 19.

[3] *Moreau v. Transp. Ins. Co.*, WCC No. 2013-3216, Statement of Agreed Facts and Issues of Law at 1, Docket Item No. 17.

[4] *Id*. at 1-2.

refused to pay $95,846 in medical benefits because the Libby Medical Plan (LMP) had already paid these medical bills and was not seeking reimbursement.[5] W.R. Grace created and funded the LMP to assist Libby residents in paying for medical costs resulting from asbestos exposure from vermiculite mining in Lincoln County.[6]

¶ 3 Moreau brought this case, contending that Transportation must pay the $95,846 because it is a primary payor with an absolute duty to pay benefits.[7] On December 6, 2013, Moreau and Transportation submitted their dispute to this Court via cross summary judgment motions on stipulated facts, which included a statement from one of W.R. Grace's attorneys and testimony from one of its executives.[8] This Court ruled that Moreau did not have standing and that this Court did not have jurisdiction.[9] The Montana Supreme Court reversed and remanded, concluding that Moreau had standing and that this Court had jurisdiction to decide this case on its merits.[10]

¶ 4 W.R. Grace now moves to be joined under M.R.Civ.P. 19 or 20, or to intervene under M.R.Civ.P. 24.[11] W.R. Grace maintains that it has an interest in this case because it has contractually agreed to indemnify Transportation for benefits paid.[12] Although W.R. Grace has not put its contract with Transportation into evidence, it has filed an affidavit of its Vice President and Associate General Counsel which states, in relevant part:

> 3. W. R. Grace was insured for workers' compensation and occupational disease claims in the state of Montana by a Workers' Compensation and Employers Liability Insurance Policy issued by Transportation Insurance Company ("Transportation"), effective June 30, 1991. The insurance was provided through a retrospective plan which requires W. R. Grace to reimburse Transportation for any benefits paid out to or on behalf of claimants effectively up to $1 million per claimant.

---

[5] *Id*. at 2-3.

[6] *Id*. at 3.

[7] *See generally* Petitioner's Response to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment, Docket Item No. 20.

[8] *Moreau v. Transp. Ins. Co*., WCC No. 2013-3216, Statement of Agreed Facts and Issues of Law at 3.

[9] *Moreau v. Transp. Ins. Co*., 2014 MTWCC 9.

[10] *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 14, 378 Mont. 10, 342 P.3d 3.

[11] Opening Brief.

[12] Opening Brief at 8-9, 11.

4. The occupational disease claim of Mr. Moreau is covered by the terms and conditions of the noted Transportation workers' compensation insurance policy and retrospective plan.

5. In 2000, W.R. Grace initiated the Libby Medical Plan ("LMP") to assist the residents of Libby, Montana, in paying for medical costs resulting from asbestos exposure associated with vermiculite mining operations in Lincoln County, Montana.

6. From 2002 to 2010, the LMP paid $95,846.00 of Mr. Moreau's medical expenses.

7. If Transportation is required to pay to the Petitioner or any other person or entity the $95,846.00 previously paid on Mr. Moreau's behalf for care and treatment of his occupational disease, W. R. Grace will be required to reimburse that amount to Transportation.[13]

Analysis and Decision

¶ 5 This case is governed by the 1991 version of the Montana Occupational Disease Act (ODA) since that was the law in effect on Edwin's last day of work for his time-of-injury employer.[14]

¶ 6 Under ARM 24.5.308(1), this Court looks to M.R.Civ.P. 14, 19, 20, and 21, where appropriate, for the joinder of parties. Under ARM 24.5.309(1), this Court looks to M.R.Civ.P. 24 for intervention.

¶ 7 W.R. Grace argues for joinder under M.R.Civ.P. 19 and 20, or intervention under M.R.Civ.P. 24, contending that its agreement to indemnify Transportation gives it an interest in this case.[15] W.R. Grace argues in its Opening Brief that if Moreau prevails, it will be required to pay Edwin's medical bills twice since the LMP, which W.R. Grace funded, already paid those bills.[16] Throughout its Reply Brief, W.R. Grace takes its argument one step further; it contends that by funding the LMP, it already paid medical *benefits* and, therefore, if Moreau prevails it will be "required to pay benefits not once but

---

[13] Affidavit in Support of Respondent/Intervenor W. R. Grace's Motion to be Joined and, Alternatively, to Intervene at 2 (Affidavit of W.R. Grace), Docket Item No. 15.

[14] *Hardgrove v. Transp. Ins. Co*., 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas. of Conn.*, 278 Mont 268, 272, 924 P.2d 264, 267 (1996)); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

[15] *See generally* Opening Brief.

[16] *Id.*

twice."[17] W.R. Grace argues that the questions of law and fact in this matter are common to both Transportation and W.R. Grace because, if this Court orders Transportation to pay $95,846 to Moreau or another designee, Transportation will simply bill this amount to W.R. Grace.[18] W.R. Grace maintains that it has standing and that this Court has jurisdiction over it.[19]

¶ 8 Moreau argues that W.R. Grace does not have a direct interest in this case because W.R. Grace is an employer, not an "insurer," and cannot be liable for occupational disease benefits.[20] Moreau argues that Transportation is the insurer and, as a matter of law, is therefore primarily and directly liable for benefits.[21] Moreau also argues that W.R. Grace does not have standing to assert any claims in this case.[22]

Issue One: Whether the Court must join W.R. Grace under M.R.Civ.P. 19 or should join W.R. Grace under M.R.Civ.P. 20.

¶ 9 M.R.Civ.P. 19 provides, in pertinent part:

> **(a) Persons Required to be Joined if Feasible.**
> (1) *Required Party*. A person who is subject to service of process must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

¶ 10 M.R.Civ.P. 20 governs permissive joinder. It provides, in pertinent part:

> **(a) Persons Who May Join or Be Joined.**

---

[17] Reply Brief at 4.

[18] Opening Brief at 5.

[19] Reply Brief at 5-7.

[20] Response Brief at 2-4.

[21] Response Brief at 2-5.

[22] Response Brief at 7-8.

> . . . .
> (2) *Defendants.* Persons may be joined in one action as defendants if:
>
> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any questions of law or fact common to all defendants will arise in the action.

¶ 11 The Montana Supreme Court has explained the purpose of these rules as follows:

> Rule 19 is concerned with necessary and indispensable parties; Rule 20 with proper parties. The absence of an indispensable party precludes the court from proceeding with the case since the rights of such party [may] be adversely affected by [the] judgment. A necessary party is one who should be present if [the] final determination of the case is to be obtained, but who is not available. The case may proceed if the same will not prejudice the rights of such party. A proper party falls within the scope of Rule 20. Such a person is one who should be joined if litigation is to be kept to a minimum and the rights of all persons concerned can be determined in one action.[23]

¶ 12 The Court has concluded that W.R. Grace is neither a necessary and indispensible party under M.R.Civ.P. 19, nor a proper party under M.R.Civ.P. 20, to this case for two reasons.

¶ 13 First, W.R. Grace does not have an interest in this case, as contemplated under M.R.Civ.P. 19 and 20, because it is not an "insurer" and therefore, cannot be liable for benefits. Section 39-71-116(9), MCA, defines "insurer" as "an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, the state fund under compensation plan No. 3, or the uninsured employers' fund provided for in part 5 of this chapter." Having chosen to obtain insurance from Transportation under Plan No. 2, W.R. Grace does not meet this definition.

¶ 14 The statutes governing Plan No. 2 insurers provide that the insurer is "directly and primarily" liable to pay the workers' compensation and occupational disease benefits. Section 39-71-2203(2), MCA, states in pertinent part:

---

[23] *Preste v. Mountain View Ranches, Inc.,* 180 Mont. 369, 375-76, 590 P.2d 1132, 1136 (1979) (quoting *Wheat v. Safeway Stores, Inc*., 146 Mont. 105, 112, 404 P.2d 317, 320 (1965)).

> No such policy shall be issued unless it contains the agreement of ***the insurer*** that it will promptly pay to the person entitled to compensation all the installments of compensation or other payments in this chapter provided for and that the obligation shall not be affected by any default of the insured . . . . Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation.[24]

Subsection (3) provides in relevant part, "Every policy . . . under compensation plan No. 2 must contain a clause to the effect that ***the insurer*** shall be directly and primarily liable to and will pay directly to the employee or in case of death to his beneficiaries or major or minor dependents, the compensation, if any, for which the employer is liable." Since W.R. Grace elected coverage under Plan No. 2, it is not liable for workers' compensation or occupational disease benefits; rather, as Moreau concedes, "W.R. Grace does not and cannot owe benefits to a worker insured under Plan No. 2. The claimant's right to benefits is exclusively against the insurer."[25]

¶ 15 W.R. Grace claims § 39-71-2203, MCA, "simply provides language which must be included in insurance policies under compensation Plan No. 2 between an insurer and the employer."[26] W.R. Grace then argues that it has an interest in this case and must be joined because its agreement to indemnify Transportation makes it ultimately liable for the benefits Moreau seeks.[27] However, in *American Zurich Ins. Co. v. District Court*,[28] the Montana Supreme Court relied upon § 39-71-2203, MCA, in explaining that by requiring this language, the Legislature intended to make a Plan No. 2 insurer's duty to pay benefits nondelegable. The Court stated:

> . . . The Montana Workers' Compensation Act provides the employee's exclusive remedy for workplace injury. By law, the employer's role in workers' compensation cases is limited. With extremely narrow exceptions, the employer is statutorily immune from suit for common law injury claims. Montana statutes require an employer to elect one of three plans for insuring workers' compensation liability. Pertinent here is Plan II, under which the employer purchases coverage through an authorized insurance company. ***The Plan II insurer is directly and primarily liable***

---

[24] Emphasis added.

[25] Response Brief at 7-8.

[26] Reply Brief at 4.

[27] *See, e.g.,* Reply Brief at 6.

[28] 2012 MT 61, 364 Mont 299, 280 P.3d 240.

> ***to the employee, and must pay directly to the employee any compensation for which the employer is liable***.
>
> Moreover, ***the insurer's duty to compensate the employee cannot be delegated to the employer***, nor can the employer veto or influence any settlement between the insurer and the employee. The rules of the Workers' Compensation Court, promulgated after extensive participation by attorneys for claimants, insurers and employers, ***make clear that the employer is not to be named as a party to an action for benefits***, except in cases involving the uninsured employers' fund or involving a request for relief against an employer. With those limited exceptions, the employer is not at risk in the action, though it retains a "duty to cooperate and assist its insurer, including any duty to assist in responding to discovery."[29]

W.R. Grace has not set forth any authority in support of its claim that an employer can circumvent the mandatory policy language and become liable for benefits by agreeing to indemnify its insurer.

¶ 16 Likewise, § 39-71-704, MCA, the statute at issue in this case, places the responsibility to pay medical benefits solely on the insurer. The plain language of this statute undercuts W.R. Grace's argument that this statute "simply provides the employee is entitled to these benefits, not that the insurer is the only entity who can provide such benefits."[30] Section 39-71-704(1)(a), MCA, states in relevant part: "After the happening of the injury and subject to the provisions of subsection (1)(d), ***the insurer shall furnish***, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained . . . ."[31] Subsections (b) and (c) also provide that "the insurer shall" be the entity that pays the benefits. Despite W.R. Grace's claim to the contrary, § 39-71-704, MCA, does not state that an entity other than the insurer can pay medical benefits.

¶ 17 The Montana Supreme Court has held that persons whose interests are one step removed from the issue in the case are neither necessary nor indispensable parties under M.R.Civ.P. 19. In *Mohl v. Johnson,*[32] the issue was whether the district court correctly

---

[29] *American Zurich Ins. Co*., ¶¶ 12-13 (emphasis added, internal citations omitted).

[30] Reply Brief at 3.

[31] Emphasis added.

[32] *Mohl*, 275 Mont. 167, 911 P.2d 217 (1996).

dismissed the case under M.R.Civ.P. 19 because the plaintiff did not name the negligent driver's employer as a defendant, even though the negligent driver was within the course and scope of his employment at the time of the accident.[33] The Court held that a potential indemnitor is not an indispensible party under M.R.Civ.P. 19, explaining:

> Assuming that [the defendant], as U-Haul's employee, may have a claim for indemnity against U-Haul, that claim would be separate and distinct from the [plaintiff's] underlying negligence claim against [the defendant]. . . . Accordingly, there is no need for the indemnity issue to be resolved simultaneously with the negligence claim. Rather, the indemnity suit would arise out of and be subsequent to the negligence suit.[34]

¶ 18 Likewise, in *State ex rel. Drum v. District Court*, First National Bank and Trust Company (First National) sued the Drums to collect the balance on ten promissory notes it had issued to the Drums.[35] The Montana Supreme Court refused to join Chase Manhattan Bank (Chase), which had a "participation agreement" with First National.[36] The Drums argued that Chase was an indispensable party under M.R.Civ.P. 19 because First National had transferred part of its interests in the promissory notes to Chase, which acquired the right to direct First National to enforce the terms of the promissory notes.[37] In denying joinder under M.R.Civ.P. 19, the Court determined that the nature of the transactions did not give rise to reciprocal rights and liabilities between the Drums and Chase.[38] The court explained:

> We conclude that the nature of the loan transactions that underlie the ten promissory notes does not give rise to reciprocal rights and liabilities therein between the Drums and Chase. The loan agreement establishes the rights and liabilities between the parties to it, viz. First National and the Drums. The participation agreement or certificate establishes the rights and liabilities between the parties to it, viz. First National and Chase. Neither establishes any contractual relationship, rights or liabilities between the Drums and Chase.

---

[33] *Mohl*, 275 Mont. at 169-70, 911 P.2d at 218-19.

[34] *Mohl*, 275 Mont. at 172, 911 P.2d at 220-21.

[35] *Drum*, 169 Mont. 494, 495-96, 548 P.2d 1377, 1378 (1976).

[36] *Drum*, 169 Mont at 504, 548 P.2d at 1383.

[37] *Drum*, 169 Mont. at 496-97, 548 P.2d at 1378.

[38] *Drum,* 169 Mont. at 500, 548 P.2d at 1380.

. . . .

> Chase's only involvement is in the participation agreement. Such agreement is simply a shared loan where the "lead", First National, sold a share of the loan to the "participant", Chase. The relationship between the two is governed by the terms of the participation agreement or certificate. Here First National is the sole owner, holder and payee of the notes and has full dominion over the security. Drum owes First National the full amount of the loan as evidenced by the notes, and First National, in turn, owes the participant its share as evidenced by the participation certificate. Drum cannot challenge the amount of First National's claim on the ground that some portion of it is ultimately payable to Chase under the terms of the participation agreement. It is no concern of Drum what First National does with the proceeds of the repaid loan.[39]

¶ 19 Like U-Haul in *Mohl* and Chase in *Drum*, W.R. Grace is not an indispensible party because its interest is secondary. W.R. Grace's interest in this case is based upon the contractual agreement it entered into with Transportation under which it agreed to indemnify Transportation. As in *Mohl*, W.R. Grace's status as a potential indemnitor does not make it an indispensible party under M.R.Civ.P. 19. As in *Drum*, the nature of that agreement does not give rise to reciprocal rights and liabilities between Moreau and W.R. Grace. Likewise, just as it was no concern of the Drums what First National chose to do with the proceeds of the repaid loan, it is of no concern to Moreau if Transportation chooses to seek reimbursement from W.R. Grace in the event that this Court orders Transportation to pay additional benefits.

¶ 20 Thus, W.R. Grace does not have an interest in this case within the meaning of M.R.Civ.P. 19 and 20 because it is not and cannot be liable for the benefits Moreau seeks.[40] This Court can provide complete relief to Transportation and Moreau, as the issue before this Court is whether Transportation must pay the $95,846 under § 39-71-704, MCA. W.R. Grace, therefore, is not a necessary or indispensible party under M.R.Civ.P. 19(a)(1)(A). Since W.R. Grace's agreement to indemnify Transportation does not make it jointly or severally liable for benefits, nor alternatively liable, it is not a proper party under M.R.Civ.P. 20.

---

[39] 169 Mont. at 500-01, 548 P.2d at 1380-81.

[40] *See John Alexander Ethen Revocable Trust v. River Resource Outfitters, LLC*, 2011 MT 143, ¶¶ 49-52, 361 Mont. 57, 256 P.3d 913 (holding that while landowners along Flint Creek had an interest in the court's interpretation of relevant surveys, they had no legal interest in the disputed boundary because it did not directly impact their parcels and, therefore, the district court did not abuse its discretion in refusing to join them under M.R.Civ.P. 19).

¶ 21 The second reason W.R. Grace is neither an indispensible, necessary, nor proper party is that this Court does not have jurisdiction over W.R. Grace's interest under the facts and circumstances of this case.[41] Section 39-71-2905, MCA, states, in relevant part, "A *claimant* or an *insurer* who has a dispute concerning any *benefits* under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying the dispute resolution requirements otherwise provided in this chapter."[42] While this Court's jurisdiction is not as limited as Moreau argues,[43] this Court does not have jurisdiction over W.R. Grace's interest because it is not an insurer. This Court's jurisdiction extends only to deciding the dispute over whether Transportation, the insurer, must pay occupational disease benefits to Moreau, the claimant.[44]

¶ 22 There is no merit to W.R. Grace's argument that this Court has jurisdiction over its interests and that it has standing because it already paid "benefits" when it funded the LMP and would be required to pay the "benefits" again by having to indemnify Transportation if Moreau prevails. Neither the money W.R. Grace paid to fund the LMP nor the money the LMP paid for the medical bills at issue were paid as workers' compensation or occupational disease benefits. Indeed, W.R. Grace "initiated" the LMP "to assist the residents of Libby, Montana, in paying for medical costs resulting from asbestos exposure,"[45] not just its employees and former employees. Moreover, even if W.R. Grace indemnifies Transportation, it will be fulfilling the contractual agreement; it will not be paying occupational disease benefits.[46]

---

[41] *See Drum*, 169 Mont. at 503, 548 P.2d 1382 (explaining that another reason Chase was not an indispensable party was because it could not be "sued in the courts of Montana under the provisions of the National Banking Act").

[42] Emphasis added.

[43] *See State ex rel. Uninsured Employers' Fund v. Hunt*, 191 Mont. 514, 519, 625 P.2d 539, 542 (1981) (holding that "the history of the court and the statute providing exclusive jurisdiction in the court indicate that the jurisdiction of the court goes beyond that minimum whenever the dispute is related to benefits payable to a claimant" and includes deciding which of several insurers is liable for paying benefits, if subrogation is allowable, what apportionment of liability may be made between insurers, and other matters that go beyond the minimum determination of the benefits payable to an employee).

[44] *See Moreau*, ¶¶ 11-13 (holding that this Court has jurisdiction over the dispute between Transportation and Moreau because it is a dispute over occupational disease benefits).

[45] Affidavit of W.R. Grace at 2.

[46] *See American Zurich Ins. Co.*, ¶¶ 12-13 (explaining that Plan No. 2 insurer is primarily and directly liable to employee for compensation and benefits and cannot delegate its duties to employer). *See also* § 39-71-407(1), MCA (insurer is liable for payment of compensation); § 39-71-704, MCA (insurer has duty to furnish medical benefits).

¶ 23 Since this Court does not have jurisdiction over W.R. Grace's interest, this case is readily distinguishable from *Johnson v. Montana Municipal Ins. Authority*,[47] which W.R. Grace cites in support of its argument. In *Johnson*, this Court allowed the Uninsured Employers' Fund (UEF) to file a third-party petition for indemnification against the uninsured employer under M.R.Civ.P. 14(a) – which provides that a defendant may file a third-party complaint against a party "who is or may be liable to [the third-party plaintiff] for all or part of the [plaintiff's] claim against [the third-party plaintiff]" – because this Court has jurisdiction over indemnity disputes between the UEF and an uninsured employer.[48] Although this Court can issue a judgment against an uninsured employer under the WCA, this Court lacks jurisdiction to issue a judgment for benefits directly against an employer insured under Plan No. 2.[49]

¶ 24 W.R. Grace's reliance on *Ballard v. Stillwater Mining Co*.[50] is also misplaced. In *Ballard*, Alaska National Insurance Company (Alaska National) accepted liability and paid benefits for an ankle injury Ballard suffered while working in Alaska.[51] Ballard then moved to Montana and allegedly re-injured his ankle while working for Stillwater Mining.[52] The issue was whether Ballard suffered a subsequent injury which materially and permanently aggravated his preexisting ankle injury.[53] After ruling that it had personal jurisdiction over Alaska National because the company conducted business in Montana,[54] this Court held that joining Alaska National under M.R.Civ.P. 19 and 20 was proper because if it found that a subsequent injury existed, then Ballard would be entitled to workers' compensation benefits from Stillwater Mining under the WCA and Alaska National would be entitled to indemnification for the benefits it paid after the second injury — an issue over which this Court would have jurisdiction.[55] This Court also explained that if Alaska National was not joined, then any judgment would extend only to Stillwater Mining and the claimant; thus,

---

[47] *Johnson*, 1998 MTWCC 50.

[48] *Id*., ¶ 6 (citation omitted). For the current statute granting this Court jurisdiction over uninsured employers, *see* § 39-71-541(2), MCA (2009-present).

[49] *Cf. In re Workers' Comp. Benefits of Noonkester*, 2006 MT 169, ¶ 20, 332 Mont. 528, 140 P.3d 466 (§ 39-71-2905(1), MCA, confers jurisdiction upon the WCC for disputes concerning benefits under chapter 71 and does not encompass a dispute between an employee and his employer concerning the merits of the employer's exclusive remedy defense in a separate tort action).

[50] *Ballard*, 1999 MTWCC 83.

[51] *Ballard*, ¶ 3.

[52] *Id*.

[53] *Id*.

[54] *Ballard*, ¶¶ 11-29.

[55] *Ballard*, ¶¶ 32-33.

joining Alaska Nation to resolve the issue eliminated the potential for the same factual issue to be litigated in Alaska, which could have resulted in inconsistent obligations.[56]

¶ 25 Unlike the indemnification dispute between Alaska National and Stillwater Mining, this Court would not have jurisdiction to resolve any disputes that arise between W.R. Grace and Transportation concerning W.R. Grace's agreement to indemnify Transportation if Moreau prevails.[57] Moreover, no risk of inconsistent obligations exists if W.R. Grace is not joined in this case. This Court has exclusive jurisdiction to determine whether Transportation must pay benefits under § 39-71-704, MCA.[58] With the exception of the Montana Supreme Court in an appeal of this case, no other Court could rule on this issue.

¶ 26 W.R. Grace is neither a necessary or indispensible party, nor a proper party under M.R.Civ.P. 19 and 20. Accordingly, its motion to be joined is denied.

Issue Two: Whether the Court must allow W.R. Grace to intervene under M.R.Civ.P. 24.

¶ 27 M.R.Civ.P 24 provides, in pertinent part:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> . . . .
>
> (2) claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.
>
> **(b) Permissive Intervention.**
>
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
>
> . . . .
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

---

[56] *Id*.

[57] *See Liberty Northwest Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, ¶ 10, 289 Mont. 475, 962 P.2d 1167 (holding that Workers' Compensation Court does not have jurisdiction over a tort claim brought by one workers' compensation insurer against another, "even though the tort action might result in a judgment requiring another party to pay, as damages, the amount which an insurer has paid to a claimant under the Workers' Compensation Act").

[58] § 39-71-2905, MCA. *See also Moreau*, ¶¶ 10-14.

. . . .

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

¶ 28 M.R.Civ.P. 24(a) allows intervention as a matter of right if: (1) the motion is timely; (2) the movant has an interest in the subject matter at issue; (3) the movant has an interest which may be impaired by the disposition of the case; and (4) the movant's interest is not adequately represented by an existing party.[59] The applicant must satisfy each of the four criteria to be entitled to intervene as a matter of right.[60]

¶ 29 Although it must meet all four factors to be entitled to intervene as a matter of right, W.R Grace has met none. W.R. Grace's motion is untimely because it has known about this dispute since 2013, when the parties first submitted this case to this Court with a statement from one of W.R. Grace's attorneys and testimony from one of its executives.[61] As set forth above, W.R. Grace has not satisfied factors (2) and (3) because its interest is secondary. Finally, W.R. Grace has not satisfied factor (4) because its interests are aligned with Transportation's[62] and Transportation is adequately representing W.R. Grace's interests. This Court's file reflects that Transportation, which is represented by an experienced and skilled workers' compensation attorney, has vigorously defended this case since its inception, and continues to do so. Aside from W.R. Grace's argument that it already paid medical benefits under § 39-71-704, MCA, when it funded the LMP, which this Court rejects, W.R. Grace has not offered any argument that Transportation has not already made. Therefore, W.R. Grace does not have a right to intervene under M.R.Civ.P. 24(a).

¶ 30 This Court will also not permit W.R. Grace to intervene under M.R.Civ.P. 24(b). W.R. Grace's motion is untimely, and it has not presented any reason for the Court to permit its intervention. Since W.R. Grace's position is aligned with Transportation's, this case is distinguishable from *In re Dick, Guardian Ad Litem for Baarson*,[63] where this Court permitted an employer to intervene under M.R.Civ.P. 24(b) because the employer's

---

[59] *Abbey/Land, LLC v. Interstate Mech., Inc*., 2015 MT 77, ¶ 14, 378 Mont. 372, 345 P.3d 1032 (citing *Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992).

[60] *Estate of Schwenke*, 252 Mont. at 131, 827 P.2d at 811 (1992) (citation omitted).

[61] *See Estate of Schwenke,* 252 Mont. at 131, 827 P.2d at 811 (1992) (holding that motion to intervene was untimely because party seeking to intervene knew of litigation for more than a year).

[62] Reply Brief at 3 ("There is no dispute between W.R. Grace and Transportation.").

[63] 2003 MTWCC 39.

position was adverse to the insurer's and because the claimant was using discovery to build a tort claim against the employer.

¶ 31 Additionally, the Court cannot determine whether W.R. Grace's involvement would delay this case, which the Court must consider under M.R.Civ.P. 24(b)(3). Moreau contends that allowing W.R. Grace to intervene might delay the adjudication of this case because it "carries with it the threat that this proceeding will be stayed by an order of the bankruptcy court."[64] W.R. Grace maintains that this is "speculation" and should not be considered.[65] However, W.R. Grace, as the moving party, is the party with the burden of proving that its intervention will not result in delay.[66] W.R. Grace has failed to satisfy this Court that its intervention will not result in delay.

¶ 32 The Court denies W.R. Grace's motion to intervene under M.R.Civ.P. 24.

ORDER

¶ 33 W.R. Grace & Co.-Conn.'s motion to be joined and, alternatively, to intervene, is **DENIED**.

DATED in this 26th day of August, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Laurie Wallace/Dustin Leftridge/Ethan Welder/Allan McGarvey
Todd A. Hammer
Bradley J. Luck
Norman H. Grosfield (courtesy copy)

Submitted: June 23, 2015

---

[64] Response Brief at 2-4.

[65] Reply Brief at 2.

[66] *See Sportsmen for I-143 v. Dist. Court*, 2002 MT 18, ¶ 14, 308 Mont. 189, 40 P.3d 400 (applicant to intervene has burden).