

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2010 MTWCC 10**

**WCC No. 2009-2417**

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**MONTANA STATE FUND**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**CASEY FOLDA**

**Respondent/Claimant**

**and**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**R&R FABRICATION**

**Third-Party Respondent.**

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**ORDER GRANTING IN PART AND DENYING IN PART R&R FABRICATION'S  
MOTION TO AMEND RESPONSE TO THIRD-PARTY PETITION FOR INDEMNITY**

**Summary:** Third-Party Respondent (R&R) moved the Court for leave to amend its response to the UEF's third-party petition for indemnity. Petitioner Montana State Fund stipulated to Third-Party Respondent's motion except for the proposed amendment seeking an award of attorney fees. Petitioner argues that R&R's proposed amendment requesting attorney fees is futile since attorney fees may only be awarded to claimants

and Third-Party Respondent is not a claimant. Third-Party Respondent responds that § 39-71-612, MCA, does not, on its face, appear to preclude a third party from receiving attorney fees but simply provides that the insurer shall pay reasonable costs and attorney fees if certain conditions are met.

**Held:** Although § 39-71-612, MCA, does not specifically preclude an award of attorney fees to a third-party respondent, § 39-71-614, MCA, provides that the amount of an attorney's fee assessed against an insurer under § 39-71-611, MCA, or § 39-71-612, MCA, must be based **exclusively** on the time spent by the attorney in **representing the claimant**. Since R&R is not a claimant it cannot recover its attorney fees under either § 39-71-611, MCA, or § 39-71-612, MCA. Although R&R's proposed amendment seeks attorney fees, "pursuant to equitable or legal principals," § 39-71-611(3), MCA, and § 39-71-612(4), MCA, specifically prohibit an award of attorney fees "under the common fund doctrine or any other action or doctrine in law or equity." Since R&R's proposed amendment would be futile, it must be denied.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611.** Section 39-71-611, MCA, restricts who can be ordered to pay attorney fees to insurers, but does not carry a similar restriction as to who can receive them. However, § 39-71-614, MCA, provides that the amount assessed against an insurer must be based exclusively on the time spent by the attorney in representing the claimant. . . . Therefore, a party to a workers' compensation case who is not a claimant cannot recover attorney fees under § 39-71-611, MCA.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-614.** Section 39-71-611, MCA, restricts who can be ordered to pay attorney fees to insurers, but does not carry a similar restriction as to who can receive them. However, § 39-71-614, MCA, provides that the amount assessed against an insurer must be based exclusively on the time spent by the attorney in representing the claimant. . . . Therefore, a party to a workers' compensation case who is not a claimant cannot recover attorney fees under § 39-71-611, MCA.

**Attorney Fees: Cases Denied.** Section 39-71-611, MCA, restricts who can be ordered to pay attorney fees to insurers, but does not carry a similar restriction as to who can receive them. However, § 39-71-614, MCA, provides that the amount assessed against an insurer must be based exclusively on the time spent by the attorney in representing the

claimant. . . . Therefore, a party to a workers' compensation case who is not a claimant cannot recover attorney fees under § 39-71-611, MCA.

**Attorney Fees: Cases Denied.** Sections 39-71-611(3), -612(4), MCA, specifically prohibit an award of attorney fees under the common fund doctrine or any other action or doctrine in law or equity. Therefore, the Court denies the party's claim for attorney fees "pursuant to equitable or legal principals [sic]."

**Pleading: Amendments.** Leave to amend pleadings shall be freely given when justice so requires. However, leave to amend is properly denied when the proposed amendments would, on their merits, be futile. Therefore, the Court denied a party's request to amend its pleading to add a plea for attorney fees in a case where the party is ineligible for attorney fees under the Workers' Compensation Act.

¶1 Third-Party Respondent R&R Fabrication (R&R) has moved the Court for leave to amend its response to the UEF's third-party petition for indemnity. Petitioner Montana State Fund (State Fund) objects in part to R&R's motion. The part of R&R's motion to which State Fund objects is R&R's proposed amendment seeking "attorneys' fees pursuant to equitable or legal principals which include but are not limited to §39-71-611, MCA, and/or §39-71-612, MCA."<sup>1</sup>

¶2 In opposing R&R's motion, State Fund notes that § 39-71-611, MCA, and § 39-71-612, MCA, govern all awards of attorney fees in matters before this Court. State Fund argues that these statutes limit an award of attorney fees only to claimants and are not available to non-claimant entities, such as R&R. State Fund notes that this Court held in *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp.* that the attorney fee statutes "afford relief only to claimants."<sup>2</sup> State Fund argues:

To extend the statutorily created right to attorney fees beyond the current status of the legal precedent – beyond the claimant – to a party from which [State Fund] is not seeking recovery, would be tantamount to the creation of an equitable theory under which fees could be awarded. This result is clearly contrary to the plain language of the statute.<sup>3</sup>

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<sup>1</sup> [State Fund's] Brief in Opposition to Third-Party Respondent R&R Fabrication's Motion to Amend Pleadings (State Fund's Brief in Opposition) at 3.

<sup>2</sup> *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 28, ¶ 4.

<sup>3</sup> State Fund's Brief in Opposition at 3.

¶3 In responding to State Fund’s objection, R&R concedes that § 39-71-612, MCA, probably will not serve as a mechanism for R&R to claim attorney fees. R&R contends, however, that § 39-71-611, MCA, may allow for R&R to recover its attorney fees. R&R argues:

The plain language of § 39-71-611, M.C.A., does not, on its face, appear to preclude a third party from receiving attorney’s fees. Rather, § 39-71-611, M.C.A., simply provides that the insurer shall pay reasonable costs and attorney’s fees if certain conditions are met . . . .<sup>4</sup>

¶4 R&R is correct that § 39-71-611, MCA, restricts who can be ordered to **pay** attorney fees to insurers, but does not carry a similar restriction as to who can **receive** attorney fees. However, the analysis cannot end there. Section 39-71-614, MCA, provides, in pertinent part: “The amount of an attorney’s fee assessed against an insurer under 39-71-611 or 39-71-612 must be based **exclusively** on the time spent by the attorney in **representing the claimant** on the issues brought to hearing.” (Emphasis added.) R&R is not the claimant. Therefore, R&R cannot recover its attorney fees under either § 39-71-611, MCA, or § 39-71-612, MCA.

¶5 Regarding the part of R&R’s proposed amendment that seeks attorney fees, “pursuant to equitable or legal principals,”<sup>5</sup> § 39-71-611(3), MCA, and § 39-71-612(4), MCA, specifically prohibit an award of attorney fees “under the common fund doctrine or any other action or doctrine in law or equity.” R&R offers no argument as to why this prohibition should not apply in the present case.

¶6 Leave to amend pleadings shall be freely given when justice so requires.<sup>6</sup> However, leave to amend is properly denied when the proposed amendments would, on their merits, be futile.<sup>7</sup> R&R’s proposed claim for attorney fees is clearly proscribed by statute. This proposed amendment is therefore futile and must be denied.

### ORDER

¶7 Except as noted below at ¶ 8, R&R’s motion to file an amended response to the UEF’s third-party petition for indemnity is **GRANTED**.

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<sup>4</sup> R&R Fabrication’s Reply Brief in Support of Motion to Amend Response to Third Party Petition for Indemnity at 3.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Keller v. Liberty Northwest, Inc.*, 2009 MTWCC 25, ¶ 5.

<sup>7</sup> *Citizens Awareness Network v. Montana Bd. of Environmental Review*, 2010 MT 10, ¶ 16, 335 Mont. 60, 227 P.3d 583.

¶8 The portion of R&R's motion to file an amended response to the UEF's third-party petition that seeks an award of attorney fees "pursuant to equitable or legal principals which include but are not limited to § 39-71-611, MCA, and/or § 39-71-612, MCA," is **DENIED**.

¶9 R&R shall file its amended response to the UEF's third-party petition for indemnity in conformance with this Order within 10 days of the date of this Order.

DATED in Helena, Montana, this 11th day of May, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: William Dean Blackaby  
Leanora O. Coles  
R. Russell Plath  
Casey J. Heitz

Submitted: April 29, 2010