

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 17

WCC No. 2020-5103

BRADY HOGAN

Petitioner

vs.

FEDERATED MUTUAL INSURANCE COMPANY

Respondent/Insurer.

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS PETITIONER'S
PETITION WITHOUT PREJUDICE**

Summary: Respondent moves to dismiss this case without prejudice on the grounds that Petitioner's claim to invalidate its subrogation lien is premature. Respondent argues that Petitioner cannot prove that he will not be made whole until he reaches MMI because he will not be able to prove the amount of workers' compensation benefits to which he will be entitled until then.

Held: Respondent's motion to dismiss is denied because Montana law does not require an injured worker to reach MMI before he brings a case to invalidate a subrogation lien under the made whole doctrine. In the formula the Montana Supreme Court has set forth to calculate whether an injured worker has been made whole, this Court is to consider the amounts "to be received under the workers' compensation claim." Thus, an injured worker may bring a claim to invalidate a subrogation lien under the made whole doctrine before he reaches MMI and while he is still receiving benefits. Based on the well-pleaded facts in his Petition for Hearing, Petitioner could prove with sufficient certainty the amount of workers' compensation benefits he will receive.

¶ 1 Respondent Federated Mutual Insurance Company (Federated Mutual) moves to dismiss without prejudice Petitioner Brady Hogan's Petition for Hearing, in which Hogan alleges that Federated Mutual's \$500,000 subrogation lien on his third-party tort recovery is invalid because he will not be made whole. Federated Mutual asserts that Hogan's

claim is premature because he has not yet reached maximum medical improvement (MMI). Federated Mutual argues that because an injured worker's entitlement to workers' compensation benefits is largely dependent on when he reaches MMI and the determinations made at that time, Hogan will not be able to prove the amount of workers' compensation benefits to which he will be entitled until he reaches MMI. Thus, Federated Mutual maintains that this Court will not be able to calculate whether Hogan has been made whole until he reaches MMI and that the proper remedy is to dismiss this case without prejudice and have him re-file his claim when he reaches MMI.

¶ 2 Hogan asserts that Montana law does not require that an injured worker reach MMI before he challenges a subrogation lien under the made whole doctrine and that there is currently a justiciable controversy. Hogan reasons that even when a claimant reaches MMI, the exact amount of workers' compensation benefits to be paid still cannot be calculated with absolute certainty and that Federated Mutual's argument, taken to its logical extreme, would mean that an injured worker could not bring an action to invalidate a subrogation lien until the injured worker dies, at which time the amount of workers' compensation benefits paid will be actually known. Hogan maintains that given the severity of his injury and the amounts of attorney fees and costs he incurred in his third-party claim, which exceeded \$2.6 million, he can prove that he will not be made whole even though he has not reached MMI.

¶ 3 Section 39-71-414, MCA, states, in relevant part, that if an injured worker recovers damages for his injuries in a third-party tort claim, "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 However, an insurer's right of subrogation is limited by the made whole doctrine, which provides, "where a workers' compensation claimant recovers against a third party, an insurer has no subrogation rights until a claimant has been made whole for his entire loss and any costs of recovery, including attorney fees."¹ The doctrine arises under the full legal redress clause of Article II, Section 16 of the Montana Constitution.² As the Montana Supreme Court noted in *Oberson v. Federated Mutual Ins. Co.*, "This Court has consistently interpreted the language of Article II, Section 16 as precluding the subrogation of a tort award until the damaged party fully recovers."³

¹ *Zacher v. Am. Ins. Co.*, 243 Mont. 226, 231, 794 P.2d 335, 338 (1990).

² *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 224, 827 P.2d 1279, 1285 (1992). The full legal redress clause in Art. II, § 16, Mont. Const., states: "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state."

³ 2005 MT 329, ¶ 14, 330 Mont. 1, 126 P.3d 459. See also *Francetich*, 252 Mont. at 224, 827 P.2d at 1285 ("[I]n a case of reasonably clear liability where a claimant is forced to settle for the limits of an insurance policy which, together with claimant's workers' compensation award, do not grant full legal redress under general tort law to the claimant, under workers' compensation laws the insurer is not entitled to subrogation rights under § 39-71-414, MCA."); *State Comp. Ins. Fund v. McMillan*, 2001 MT 168, ¶ 7, 306 Mont. 155, 31 P.3d 347 (citation omitted).

¶ 5 The Montana Supreme Court has set forth the following formula to calculate if a claimant has been made whole:

In determining whether a claimant has been made whole, the amounts received ***and to be received*** under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss, pursuant to § 39-71-414, MCA (1983).⁴

¶ 6 Hogan is correct that Montana subrogation law does not require that an injured worker reach MMI before bringing a claim to invalidate a subrogation lien and that an injured worker may bring such a claim while workers' compensation benefits are still being paid. There is no statute or case stating that an injured worker must wait until he reaches MMI to bring such a claim. Moreover, because the formula to be used to calculate whether an injured worker has been made whole includes the amounts "to be received under the workers' compensation claim," this Court will not dismiss this case because an injured worker may bring a claim to invalidate a subrogation lien under the made whole doctrine while workers' compensation benefits are still being paid, including before he reaches MMI.

¶ 7 This Court has explained:

When considering a motion to dismiss, all well pleaded facts are deemed admitted, and the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief." "Motions to dismiss are viewed with disfavor and will be granted only where the allegations of the petition or complaint either show that the claimant is not entitled to relief of any sort . . . or discloses an 'insuperable bar' to recovery."⁵

¶ 8 Based on the allegations in Hogan's Petition for Hearing, he could prove facts that would entitle him to relief even before he reaches MMI; i.e., Hogan could prove the amount of workers' compensation benefits to be received with sufficient certainty for this Court to make findings of fact and calculate whether he will be made whole. If a dispute arises that will require Hogan to reach MMI for this Court to make findings as to the amount of workers' compensation benefits which he will receive — e.g., if a dispute arises

⁴ *McMillan*, ¶ 12 (emphasis added) (italics removed) (citation omitted).

⁵ *Jacobsen Ranch Co. v. Dix*, 2012 MTWCC 33, ¶ 13 (citations omitted).

as to whether he is permanently totally disabled or permanently partially disabled⁶ — then the appropriate procedure will be to hold the case in abeyance, not to dismiss his current Petition for Hearing. Accordingly, Federated Mutual’s Motion to Dismiss Petitioner’s Petition for Hearing Without Prejudice is **denied**.

DATED this 2nd day of September, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Leo S. Ward

Submitted: August 10, 2020

⁶ See *Loranger v. Mont. State Fund*, 2019 MTWCC 18, ¶ 20 (ruling that under established case law, insurer was entitled to summary judgment on injured worker’s claim for permanent total disability benefits because his claim was premature because he had not reached MMI).