

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 7

WCC No. 2020-5103

BRADY HOGAN

Petitioner

vs.

FEDERATED MUTUAL INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION TO COMPEL DISCOVERY

Summary: Petitioner alleges that Respondent may not exercise its right of subrogation because he has not been made whole. He now seeks an order compelling Respondent to produce its reserve information, asserting that reserve information is relevant to the issue of the amount of workers' compensation benefits to be paid in the future.

Held: After reviewing the Montana Supreme Court's decisions in the area of workers' compensation subrogation, this Court decided that it is unnecessary to make a finding of the amount of workers' compensation benefits to be paid in the future to decide whether Petitioner has presently been made whole. Because it is unnecessary for this Court to make a finding of the amount of benefits to be paid, Respondent's reserve information is irrelevant and not discoverable.

¶ 1 In his Petition for Hearing, Petitioner Brady Hogan asserts, *inter alia*, that Respondent Federated Mutual Insurance Company (Federated Mutual) may not exercise its right of subrogation on his third-party tort recovery because he has not been made whole. Hogan now moves to compel Federated Mutual to produce its reserve information, asserting that the information is relevant to the issue of the amount of workers' compensation benefits "to be paid" in the future.

¶ 2 Federated Mutual argues, *inter alia*, that its reserve information is not relevant to the issues to be decided in this case.

¶ 3 At the outset, this Court is not persuaded by Hogan’s arguments that Federated Mutual’s objections to producing its reserve information were deficient.

¶ 4 Section 39-71-412, MCA (2017), gives a claimant the right to bring a tort claim against a negligent third party who caused his injury.

¶ 5 Section 39-71-414(1), MCA (2017), gives a workers’ compensation insurer the right of subrogation against a claimant’s third-party tort recovery. It states:

If an action is prosecuted as provided for in 39-71-412 . . . 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.

¶ 6 Nevertheless, an insurer’s right of subrogation is limited by the made whole doctrine, which provides that an insurer cannot exercise its right of subrogation until the claimant has been made whole for his entire loss and any costs of recovery, including attorney fees.¹

¶ 7 There is a minor inconsistency in the Montana Supreme Court’s decisions as to what evidence this Court is to rely upon to find whether a claimant has been made whole. In *Zacher v. American Ins. Co.*,² the court set forth a formula to use to determine if a claimant has been made whole, which includes the amount “to be received under the workers’ compensation claim.” The court stated:

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).³

¶ 8 However, presumably because a claimant cannot be presently made whole based on workers’ compensation benefits to be received in the future, the court has also held

¹ *Hall v. State Comp. Ins. Fund*, 218 Mont. 180, 183, 708 P.2d 234, 236-37 (1985) (citation omitted); *Zacher v. Am. Ins. Co.*, 243 Mont. 226, 231, 794 P.2d 335, 338 (1990); *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 478, 929 P.2d 205, 210 (1996) (citations omitted); *State Comp. Ins. Fund v. McMillan*, 2001 MT 168, ¶ 7, 306 Mont. 155, 31 P.3d 347 (citations omitted); *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 224, 827 P.2d 1279, 1285 (1992); *Oberson v. Federated Mut. Ins. Co.*, 2005 MT 329, ¶ 14, 330 Mont. 1, 126 P.3d 459; *Moreau v. Transp. Ins. Co.*, 2018 MT 1, ¶ 18, 408 P.3d 538, 390 Mont. 102 (citations omitted).

² 243 Mont. at 231, 794 P.2d at 338.

³ *Id.*

that this Court is to find whether the claimant has been made whole based only on the amount that the claimant has recovered from his third-party claim and the amount of workers' compensation benefits that have been paid at the time of trial. In *Ness*, the court did not include the amount of workers' compensation benefits to be paid in the future when deciding whether the claimant had been made whole; instead, the court considered only the amount that the claimant had recovered in his tort claim and the amount of workers' compensation benefits that had already been paid.⁴ The court explained, "The question of whether an injured claimant has been made whole is a question of *fact*, dependent on the level of his or her physical recovery and the extent of his or her compensation through benefits paid and/or damages recouped."⁵ The court held that this Court correctly ruled that the insurer could not then exercise its right of subrogation because the claimant had not been made whole because the claimant had not "to date" received benefits and settlement proceeds totaling the amount of his entire loss.⁶

¶ 9 Because a claimant cannot be presently made whole based even in part on the amount of workers' compensation benefits to be paid in the future, this Court concludes that it is unnecessary to make a finding of the amount of workers' compensation benefits "to be paid" to decide whether Hogan has been made whole. As in *Ness*, this Court will find the amount that will make Hogan whole — i.e., the amount of Hogan's entire loss plus his costs of recovery, including attorney fees. This Court will also find the amount that Hogan has recovered from his third-party claim and the amount of workers' compensation benefits that Federated Mutual has paid at the time of trial. If Hogan has already been made whole and has already received an amount more than the amount necessary to make him whole, then this Court will rule that Federated Mutual may exercise its right of subrogation on the excess amount. If Hogan has not yet been made whole, this Court will rule that Federated Mutual cannot presently exercise its right of subrogation, as in *Ness*,⁷ and that it is obligated to continue to pay benefits until Hogan is made whole, at which time it may exercise its right of subrogation by terminating Hogan's benefits, as set forth in *State Compensation Ins. Fund v. McMillan*.⁸

⁴ *Ness*, 279 Mont. at 481, 929 P.2d at 211.

⁵ *Id.* (italics in original). See also *Francetich*, 252 Mont. at 224, 827 P.2d at 1285 (explaining, "The record before the Workers' Compensation Court does not contain evidence relative to the extent of the damages, recovery, costs of recovery, and attorney fees so far as the claimant is concerned. We therefore remand the matter to the Workers' Compensation Court so that the court may make a factual determination as to whether the claimant's damages and costs of being made whole exceed his workers' compensation and third-party recovery combined . . .").

⁶ *Ness*, 279 Mont. at 481, 929 P.2d at 211.

⁷ *Ness*, 279 Mont. at 481-82, 929 P.2d at 211 (reasoning, "The issue of whether a claimant has been made whole is a question of fact. Even Anaconda's own expert admits that *Ness* in fact has not been made whole to date. Accordingly, the Workers' Compensation Court did not err in refusing to grant Anaconda the right to a subrogation interest in *Ness*'s settlement with Caterpillar.").

⁸ *McMillan*, ¶ 15 (explaining, "When *McMillan* has recovered the amount of his entire loss of \$4.7 million plus costs of recovery, [State Fund] may properly assert its subrogation interest. At that time, State Fund's obligation to pay lifetime medical benefits will cease, and *McMillan* will pay any continuing medical expenses from his third party recovery or other resources.").

¶ 10 Because this Court need not make a finding of the amount of workers' compensation benefits to be paid in the future to find whether Hogan has presently been made whole, Federated Mutual's reserve information is irrelevant and not discoverable.⁹

¶ 11 Accordingly, this Court now enters the following:

ORDER

¶ 12 Hogan's Motion to Compel Discovery is **denied**.

DATED this 3rd day of May, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Leo S. Ward

Submitted October 23, 2020

⁹ See M.R.Civ.P. 26(b)(1) (stating, "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").