

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 12

WCC No. 2008-2152

BROCK HOPKINS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

RUSSELL A. KILPATRICK

Intervenor.

ORDER DENYING UNINSURED EMPLOYERS' FUND'S MOTION FOR
RECONSIDERATION AND DISMISSING UNINSURED EMPLOYERS' FUND'S
THIRD-PARTY PETITION FOR STATUTORY INDEMNITY

Summary: The Uninsured Employers' Fund (UEF) moved this Court to reconsider its decision dismissing the alleged uninsured employer from this case *sua sponte*. The UEF argues that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action. The UEF also filed a third-party petition for statutory indemnity simultaneously with its response to the petition in this matter.

Held: The UEF's arguments have not persuaded the Court that the statutory procedures can be circumvented without impinging upon the due process rights of alleged uninsured employers, and its motion for reconsideration is therefore denied. The UEF's third-party petition is dismissed because the UEF has not provided any indication that it complied with the due process requirements of § 39-71-506, MCA.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-506. Section 39-71-506, MCA, is not a mere lien statute, but specifically lays out the procedure by which the UEF obtains a judgment

against an uninsured employer. The statute's language does not give this Court authority to enter a judgment against an uninsured employer in favor of the UEF. Rather, the UEF obtains the judgement by first satisfying the due process requirements of § 39-71-2401(2)-(3), MCA, and must bring the dispute before the Department of Labor and Industry for resolution.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.307A. ARM 24.5.307A was promulgated by this Court to foster judicial economy and it did so. However, judicial economy does not trump statutory mandates and therefore the statutory procedures regarding alleged uninsured employers must be followed by the UEF and by this Court. Conjectured savings in judicial economy cannot be a source of subject-matter jurisdiction.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905. Although the UEF argues that § 39-71-2905, MCA, gives the Court the authority to consider its dispute against an alleged uninsured employer, this statute specifically reads that a claimant or *insurer* . . . may petition this Court. The UEF is not a claimant and has repeatedly argued to this Court that it is not an insurer. It offers no rationale as to why this Court should consider it an insurer for purposes of § 39-71-2905, MCA, and yet not consider it an insurer under § 39-71-2907, MCA.

Statutes and Statutory Interpretation: Conflicting Provisions. Whenever a statute addresses a subject in general and comprehensive terms, and another statute addresses a part of the same subject in a more minute and definite way, the two should be read together and harmonized, as much as possible, to give effect to each. If the specific statute conflicts with the general statute and cannot be harmonized to give effect to both, the specific statute controls over the general statute to the extent of the inconsistency.

Constitutional Law: Due Process. Although the UEF asserted that its third-party petition put the uninsured employer on notice of Petitioner's claim for benefits and the employer's obligation to indemnify the UEF, and further asserted that the employer was given "an opportunity to participate in the mediation," neither of these actions fulfill the due process requirements of §§ 39-71-506, -2401(2)-(3), MCA, and therefore the third-party petition is dismissed.

Uninsured Employers' Fund: Procedure. Although the UEF asserted that its third-party petition put the uninsured employer on notice of Petitioner's

claim for benefits and the employer's obligation to indemnify the UEF, and further asserted that the employer was given "an opportunity to participate in the mediation," neither of these actions fulfill the due process requirements of §§ 39-71-506, -2401(2)-(3), MCA, and therefore the third-party petition is dismissed.

¶ 1 Respondent Uninsured Employers' Fund (UEF) has moved this Court for reconsideration of its January 21, 2009, Order which dismissed, *sua sponte*, the alleged uninsured employer as a party to this case.¹ Additionally, the UEF has filed a third-party petition in which it requests that this Court enter a judgment ordering Russell A. Kilpatrick, Petitioner's alleged uninsured employer, to indemnify the UEF for all benefits paid or payable on the present claim.² Oral argument on the UEF's motion and the third-party petition was held on February 25, 2009, in the Workers' Compensation Court. Petitioner Brock Hopkins was represented by Jeffrey Ellingson, who participated telephonically. Respondent Uninsured Employers' Fund was represented by Joseph Nevin and Mark Cadwallader. Intervenor Russell A. Kilpatrick was represented by Bryce R. Floch, who participated telephonically.³

UEF's Motion for Reconsideration

¶ 2 Recently, in *Raymond v. Uninsured Employers' Fund*,⁴ I concluded that, notwithstanding the provisions of ARM 24.5.307A, which allowed for the joinder of an alleged uninsured employer to an action involving entitlement to UEF benefits, alleged uninsured employers cannot be joined as a matter of course without following the statutory procedure set forth in § 39-71-506, MCA, which in turn requires that the due process requirements of § 39-71-2401(2)-(3), MCA, must be satisfied. In that Order, I explained:

Section 39-71-2401(2), MCA, provides that a dispute arising under this chapter for which a specific provision of the chapter gives jurisdiction to the Department of Labor and Industry ("Department"), **must** be brought before the Department. Section 39-71-2401(3), MCA, provides that an appeal from the Department's order may be made to the Workers' Compensation Court. In the present case, the UEF has not yet made a claim for reimbursement

¹ Order Dismissing Uninsured Employer and Changing Caption, Docket Item No. 19.

² Uninsured Employers' Fund's Third-Party Petition for Statutory Indemnity (Third-Party Petition), Docket Item No. 11.

³ Minute Book Hearing No. 4033, Docket Item No. 33.

⁴ *Raymond*, 2008 MTWCC 45 (*reconsideration denied* 2008 MTWCC 52).

from [the alleged uninsured employer]. Therefore, there is no dispute between the UEF and [the alleged uninsured employer] to bring before the Department as mandated by § 39-71-2401(2), MCA. Accordingly, there is no Department order to appeal to this Court pursuant to § 39-71-2401(3), MCA. These are the due process requirements which § 39-71-506(1), MCA, expressly requires for the UEF to successfully assert a claim for reimbursement from an uninsured employer. Until these due process requirements are satisfied, this Court cannot consider a reimbursement dispute between the UEF and [the alleged uninsured employer].⁵

¶ 3 The UEF contends that § 39-71-506, MCA, is nothing more than a lien statute that provides the UEF with a “shortcut” to obtaining a lien against an alleged uninsured employer. This contention is wholly unsupported by the language of the statute itself. Rather than being merely a lien statute, § 39-71-506, MCA, specifically lays out the procedure by which the UEF obtains a judgment against an uninsured employer. This procedure begins with the requirement that the UEF first satisfy the due process requirements of § 39-71-2401(2)-(3), MCA. After these due process requirements are satisfied, the Department may issue a certificate setting forth the amount due. The Department can then direct the clerk of district court to enter the “certificate as a judgment.” After that certificate is entered as a judgment on the docket of the district court, that judgment becomes a lien. Nowhere in this very specific language can I find the authority for this Court to enter a judgment against an uninsured employer in favor of the UEF. Rather, the UEF obtains the judgment by first satisfying the due process requirements of § 39-71-2401(2)-(3), MCA. Section 39-71-2401(2), MCA, is a mandatory statute which states that the dispute *must* be brought before the Department. Per the statute, after the dispute is brought before the Department, the Department’s decision may then be appealed to the Workers’ Compensation Court.

¶ 4 In the present case, the UEF argues that this Court has incorrectly interpreted § 39-71-506, MCA, arguing that the statute’s only purpose is to provide a shortcut for putting a lien on the property of a person who has not complied with state law. The UEF argues that § 39-71-506, MCA, is part of a “family” of statutes which also includes §§ 39-51-1304, 40-5-247, 40-5-248, 15-1-701, and 15-1-704, MCA. Aside from this unsupported conclusory statement, however, the UEF offers no explanation as to how any of these statutes would somehow bear upon this Court’s interpretation of § 39-71-506, MCA. The plain reading of § 39-71-506, MCA, does not contemplate the UEF coming straight to this Court to obtain a judgment against an alleged uninsured employer. Nothing in the alleged “family of statutes” cited by the UEF changes this simple fact.

⁵ *Raymond*, 2008 MTWCC 45, ¶ 7.

¶ 5 The UEF argues that this Court suddenly decided, as if on a whim, to cease to follow ARM 24.5.307A, which provides for the joinder of alleged uninsured employers in actions involving an uninsured employee and the UEF. The UEF argues that administrative rules have the force of law and cannot be ignored. During oral argument, counsel for the UEF argued that the UEF's historical practice has been to have the injured worker, the alleged uninsured employer, and the UEF together in the same trial after mediation has been completed. Counsel argued that, with the alleged uninsured employer joined as a party, this procedure ensured that the alleged uninsured employer would be bound by the outcome of the trial and the UEF would then avoid the risk of being caught in the situation of being ordered to pay benefits for which it may not be indemnified if it does not prevail over the alleged uninsured employer in a separate proceeding.

¶ 6 In its motion for reconsideration in *Raymond*, the UEF offered the same argument regarding the invalidation of ARM 24.5.307A, and this Court rejected the UEF's argument in that case. As set forth in *Raymond*, this Court has the authority to determine if its rules do not comply with the statutes under which they were adopted. Where a rule conflicts with a statute, the rule is invalid.⁶

¶ 7 In the present case, as I held in the September 19, 2008, Order, my interpretation of the applicable statutes has caused me to conclude that they are in conflict with the provisions of ARM 24.5.307A. Clearly, ARM 24.5.307A was promulgated by this Court to foster judicial economy, and it did so. However, as I have stated above, judicial economy does not trump statutory mandates, and therefore, the statutory procedures regarding alleged uninsured employers must be followed by the UEF and by this Court. At oral argument, I noted that as a matter of judicial economy and of practicality, having the parties joined in the same action makes sense. However, as the Montana Supreme Court noted in *Thompson v. State*, the Legislature creates the statutory scheme, and "conjectured savings in judicial economy cannot be a source of subject-matter jurisdiction."⁷ Therefore, while I agree with the UEF that the procedure it prefers may be more judicially economical and may preclude the risk of inconsistent results which may occur by following the procedure of § 39-71-506, MCA, this Court cannot ignore the procedure set forth in the statute because there may be a better way of doing things.

¶ 8 The UEF has also drawn the Court's attention to a 1993 amendment to § 39-71-506, MCA. In 1993 the statute was amended as follows:

⁶ *Raymond*, 2008 MTWCC 52, ¶ 6.

⁷ *Thompson v. State*, 2007 MT 185, ¶ 34, 338 Mont. 511, 167 P.3d 867.

39-71-506. Collection of payments from uninsured employer by suit. Lien for payment of unpaid penalties and claims – levy and execution. (1) If, upon demand of the department, an uninsured employer refuses to make the payments to the fund that are provided for in subsections (1) and (2) of 39-71-504, the sums may be collected by the department through suit: unpaid penalties and claims have the effect of a judgment against the employer at the time the payments become due. After the due process requirements of 39-71-2401(2) and (3) are satisfied, the department may issue a certificate setting forth the amount of payment due and direct the clerk of the district court of any county in the state to enter the certificate as a judgment on the docket pursuant to 25-9-301. From the time the judgment is docketed, it becomes a lien upon all real property of the employer. After satisfying any due process requirements, the department may enforce the judgment at any time within 10 years of creation of the lien.

(2) The department may settle through compromise with an uninsured employer the amount due the fund under 39-71-504.

¶ 9 As I noted to the UEF’s counsel at oral argument, the most instructive aspect of the 1993 amendment to § 39-71-506, MCA, is that it appears to support this Court’s interpretation of the statute. Prior to 1993, the statute provided that the UEF could seek reimbursement from an alleged uninsured employer “through suit.” Black’s Law Dictionary defines “suit” as, “Any proceeding by a party or parties against another in a court of law”⁸ In 1993 the Legislature specifically deleted that procedure and replaced it with the current procedure. Nevertheless, the UEF argues that in seeking indemnification from an alleged uninsured employer, it should be allowed to forgo going to the Department and instead come directly to this Court. In other words, it wants this Court to allow it to follow the exact procedure the Legislature omitted from the statute in 1993 instead of following the procedure the Legislature inserted into the statute with the 1993 amendment. It is a fundamental rule of statutory construction that a court is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”⁹ What the UEF is asking this Court to do is turn this fundamental rule on its head.

¶ 10 Finally, the UEF argues that § 39-71-2905, MCA, gives the Court the authority to consider its dispute against an alleged uninsured employer. This statute specifically reads

⁸ *Black’s Law Dictionary* 1475 (8th ed. 2004).

⁹ *Barnard v. Liberty Northwest Ins. Corp.*, 2008 MT 254, ¶ 17, 345 Mont. 81, 189 P.3d 1196 (citing § 1-2-101, MCA).

that a claimant or *insurer* who has a dispute concerning any benefits under this chapter may petition this Court for determination of the dispute. The UEF is not a claimant and has argued repeatedly to this Court that it is not an insurer under § 39-71-2907, MCA.¹⁰ The UEF offers no rationale as to why this Court should consider the UEF an insurer for purposes of § 39-71-2905, MCA, yet not an insurer for purposes of § 39-71-2907, MCA. Moreover, even were I to accept the UEF's argument that it can selectively determine when it is or is not an insurer, its reliance on § 39-71-2905, MCA, would still be misplaced.

¶ 11 Section 39-71-2905, MCA, vests this Court generally with jurisdiction to adjudicate disputes under the Workers' Compensation Act. Section 39-71-506, MCA, provides for a specific procedure by which disputes between the UEF and an alleged uninsured employer are to be resolved. This procedure allows for the ultimate disposition of the dispute in this Court; however, it does not allow for the dispute to be brought directly in this Court without first satisfying specific due process mandates. Whenever a statute addresses a subject in general and comprehensive terms, and another statute addresses a part of the same subject in a more minute and definite way, the two should be read together and harmonized, as much as possible, giving effect to each.¹¹ If the specific statute conflicts with the general statute and cannot be harmonized to give effect to both, the specific statute controls over the general statute "to the extent of the inconsistency."¹² In this case, the specific process set forth in § 39-71-506, MCA, must be followed. Therefore, I conclude that the UEF may not circumvent the due process requirements of § 39-71-506, MCA, by alternately bringing suit under § 39-71-2905, MCA.

UEF's Third-Party Petition

¶ 12 The UEF further argues that this case is factually distinguishable from *Raymond* because it has filed a third-party petition for statutory indemnity.¹³

¶ 13 Relying on *Johnson v. Montana Mun. Ins. Auth.*,¹⁴ the UEF argues that its third-party petition for statutory indemnity gives this Court jurisdiction over the "indemnity dispute"

¹⁰ See, e.g., *Pekus v. Uninsured Employers' Fund*, 2003 MTWCC 33, ¶ 4 (no penalty can be assessed against UEF since it is not an "insurer" within the meaning of the Workers' Compensation Act).

¹¹ *Montana Sports Shooting Ass'n, Inc. v. Montana Dep't of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 41, 344 Mont. 1, 185 P.3d 1003.

¹² *Id.*

¹³ Third-Party Petition.

¹⁴ *Johnson*, 1998 MTWCC 50.

between the UEF and the alleged uninsured employer.¹⁵ The UEF further argues that its filing of a third-party petition for statutory indemnity “respects” the alleged uninsured employer’s due process rights. In its third-party petition, the UEF asserts that it “put Kilpatrick on notice” of Petitioner’s claim for benefits and Kilpatrick’s obligation to indemnify the UEF under § 39-71-504, MCA; and that Kilpatrick “was given notice and an opportunity to participate in the mediation” between Petitioner and the UEF.¹⁶ Neither of these actions fulfill the due process requirements of §§ 39-71-506, -2401(2)-(3), MCA. Since the UEF has not complied with the statutory due process requirements, its third-party petition is dismissed.

ORDER

¶ 14 Respondent’s motion for reconsideration is **DENIED**.

¶ 15 Respondent’s third-party petition is **DISMISSED**.

¶ 16 Pursuant to § 39-71-517, MCA, Petitioner and Respondent shall continue to serve all pleadings and all other litigation papers upon the Department and the alleged uninsured employer.

DATED in Helena, Montana, this 20th day of March, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jeffrey Ellingson
Joseph Nevin
Mark Cadwallader
Bryce R. Floch
Submitted: February 25, 2009

¹⁵ [UEF’s] Motion for Reconsideration and Brief in Support at 3, Docket Item No. 24.

¹⁶ Third-Party Petition at 2.