

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 28

WCC No. 2011-2768

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

IN RE: BRIAN McKIRDY

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND
GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT IN PART

Summary: Respondent moved for summary judgment, arguing that the claimant either suffered an occupational disease while his employer was insured by Petitioner, or alternatively, that he failed to notify Respondent of his industrial injury within 30 days. Petitioner cross-motivated, arguing that the claimant suffered an industrial injury while Respondent insured the claimant's employer, and demanding Respondent reimburse it for benefits paid to the claimant.

Held: The undisputed facts demonstrate that the claimant suffered an industrial injury while Respondent was the insurer at risk. However, Respondent's defense to the claimant's claim cannot be raised in this case because the claimant is not a party. Petitioner is not liable for the claimant's claim. However, Petitioner has not proven that it is entitled to indemnification from Respondent. Respondent's motion for summary judgment is denied. Petitioner's cross-motion for summary judgment is granted in part and denied in part.

Topics:

Occupational Disease: Occupational Disease Versus Injury. Although Respondent argues that the claimant suffered from an occupational disease, the evidence presented to the Court was that the claimant felt a "pop" while working, the claimant's supervisor testified that he witnessed

the incident, and the claimant's treating physician opined that the claimant's rotator cuff tear was caused by an industrial accident. The Court concluded the claimant had an injury and not an occupational disease.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Although Respondent argues that the claimant suffered from an occupational disease, the evidence presented to the Court was that the claimant felt a "pop" while working, the claimant's supervisor testified that he witnessed the incident, and the claimant's treating physician opined that the claimant's rotator cuff tear was caused by an industrial accident. The Court concluded the claimant had an injury and not an occupational disease.

Indemnification: Between Insurers. Where the Court concluded that the claimant suffered an industrial injury on a specific date, and the employer's subsequent insurer paid under a reservation of rights, the Court concluded that the at-risk insurer could not bar the subsequent insurer from raising a defense on the grounds that the claimant, who was not a party to the lawsuit, might also benefit if the subsequent insurer prevailed in its indemnification claim.

Procedure: Parties. The Court concluded that, where the claimant was not a party to this action, the Court could not make a ruling which would affect the claimant's interests since the claimant is entitled to due process of law.

Equity: Equitable Estoppel. The third element of equitable estoppel is not fulfilled unless the facts relate to the two involved parties; if an estoppel exists, it would be between the two parties to the dispute.

¶ 1 Respondent Montana State Fund (State Fund) moves this Court for summary judgment in its favor. State Fund contends that Petitioner Hartford Insurance Company of the Midwest (Hartford) should not prevail in its claim against State Fund for benefits Hartford paid to claimant Brian McKirdy because McKirdy suffers from an occupational disease. Alternatively, State Fund argues that if this Court determines McKirdy suffered from an industrial injury, it should rule that McKirdy failed to provide notice of his injury within 30 days as required by § 39-71-603, MCA.¹ Hartford objects to State Fund's

¹ Montana State Fund's Motion for Summary Judgment (Opening Brief), Docket Item No. 13.

motion and has cross-motined for summary judgment, arguing that State Fund is liable for McKirdy's claim because McKirdy suffered an industrial injury when State Fund was the insurer at risk. Hartford asks the Court to order State Fund to indemnify it for compensation it paid to McKirdy.²

Undisputed Facts³

¶ 2 On January 22, 2009, State Fund began insuring Rocky Mountain Electrical Contracting (RMEC).⁴

¶ 3 State Fund's documentation identifies McKirdy as an owner, officer, or vice-president at RMEC.⁵

¶ 4 On approximately December 1, 2009, McKirdy heard a "pop" in his shoulder while working at RMEC. McKirdy's supervisor Joe Needles testified that he witnessed the incident and he has no doubt McKirdy suffered an injury on that date.⁶

¶ 5 On January 22, 2010, RMEC's workers' compensation insurance policy with State Fund expired.⁷

¶ 6 On April 1, 2010, Hartford began insuring RMEC for workers' compensation.⁸

¶ 7 On August 12, 2010, McKirdy sought medical treatment.⁹

¶ 8 On November 14, 2010, McKirdy filed a first report of injury (FROI) with State Fund.¹⁰

² Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment and Brief in Support (Response Brief), Docket Item No. 27.

³ Neither party objected to the other's proffered facts.

⁴ Opening Brief at 2.

⁵ *Id.*

⁶ Response Brief at 2.

⁷ Opening Brief at 2.

⁸ *Id.*

⁹ Response Brief at 3.

¹⁰ Opening Brief at 2.

¶ 9 On December 1, 2010, State Fund declined to process the FROI, apparently believing that McKirdy's date of injury was August 12, 2010, when Hartford insured RMEC. State Fund's claims adjuster noted that the only issue regarding McKirdy's claim was whether State Fund or Hartford should process the claim.¹¹

¶ 10 On December 16, 2010, McKirdy underwent surgery to repair a torn rotator cuff.¹²

¶ 11 On January 7, 2011, McKirdy filed a FROI with Hartford.¹³

¶ 12 On January 18, 2011, Hartford denied McKirdy's claim, noting that it did not insure RMEC on December 1, 2009.¹⁴

¶ 13 On January 27, 2011, Hartford forwarded McKirdy's claim to State Fund.¹⁵

¶ 14 On February 4, 2011, a State Fund claims adjuster informed McKirdy that State Fund was in the process of determining which insurer was liable for his claim, but that State Fund believed Hartford was the liable insurer.¹⁶

¶ 15 On February 11, 2011, State Fund denied McKirdy's claim on the grounds that his condition was an occupational disease and that Hartford was the insurer at the time of McKirdy's last injurious exposure.¹⁷

¶ 16 On April 11, 2011, Hartford informed McKirdy that it would pay his claim on a disputed liability basis and with a reservation of rights under § 39-71-407(5), MCA.¹⁸

¶ 17 On May 16, 2011, McKirdy's treating physician opined that his rotator cuff injury was caused by an industrial accident on December 1, 2009.¹⁹

¹¹ Response Brief at 3.

¹² Response Brief at 3-4.

¹³ Response Brief at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Response Brief at 5.

¹⁹ *Id.*

Analysis and Decision

¶ 18 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.²⁰ The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 19 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of McKirdy's industrial accident.²¹

¶ 20 The undisputed facts, as set forth above, show that McKirdy suffered an industrial injury in December 2009. Although State Fund argues McKirdy suffered from an occupational disease, State Fund offers no evidence in support of this theory. Conversely, McKirdy testified that he felt a "pop" while working and his supervisor testified that he witnessed the incident and has no doubt that McKirdy suffered an injury on that date. Furthermore, McKirdy underwent surgery to repair a rotator cuff tear which his treating physician opined was caused by a December 2009 industrial accident.

¶ 21 Based on the undisputed facts, McKirdy suffered an industrial injury, as defined in § 39-71-119(2), MCA. Hartford, which was not RMEC's insurer in December 2009, is not liable for McKirdy's workers' compensation claim.

¶ 22 Hartford argues that State Fund should indemnify it for the benefits it paid to McKirdy under a reservation of rights.²² However, State Fund argues that if this Court determines that McKirdy suffered an industrial injury, State Fund has a defense against McKirdy's claim in that he failed to notify it of his industrial injury within 30 days as required by § 39-71-603(2), MCA.²³ Hartford responds that State Fund is estopped from denying McKirdy's claim for benefits because it did not advise him of his obligation under § 39-71-603(2), MCA, and because it did not inform McKirdy or Hartford that it

²⁰ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

²¹ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

²² Response Brief at 17.

²³ Opening Brief at 3-4.

was denying McKirdy's claim for failing to comply with the notice requirements of § 39-71-603(2), MCA.²⁴

¶ 23 Hartford asserts that it agreed to pay McKirdy's benefits under a reservation of rights because State Fund represented that it was denying liability on the basis of not being the insurer at risk at the time of McKirdy's claim. Hartford argues that State Fund led Hartford to believe that the only dispute was the liability between insurers and that State Fund should be equitably estopped from now asserting that neither insurer is liable for McKirdy's claim.²⁵

¶ 24 State Fund responds that Hartford has no standing to claim equitable estoppel because Hartford essentially asserts this argument on behalf of a party not joined in this action. State Fund argues that McKirdy has a compelling interest in this matter, and that since McKirdy is not a party to this action, Hartford may not defend McKirdy "and then, by proxy, reap the benefits of the alleged harm."²⁶

¶ 25 State Fund acknowledges that McKirdy is not a party and is therefore unable to defend himself in the present case. Yet State Fund argues that this Court should nonetheless bar McKirdy's claim as untimely. On the other hand, State Fund argues that Hartford – who stands a good chance of not recovering the money it paid under a reservation of rights if State Fund's defense stands – has no standing to argue that State Fund is equitably estopped from putting forth a notice defense from which both it and McKirdy could benefit.

¶ 26 To sum up, State Fund's position is: "The Court should allow State Fund to raise a defense which would bar McKirdy's recovery in a suit to which McKirdy is not a party; however, the Court should not allow Hartford to raise a defense which might also benefit McKirdy because McKirdy is not a party, and therefore should not potentially benefit from the outcome of this case." Although positively Kafkaesque in its ingenuity, State Fund's argument is nonetheless without merit.

¶ 27 In *Montana State Fund v. Zurich American Ins. Co.*, State Fund accepted liability for an industrial injury claim filed by the claimant (Golt) in 1993.²⁷ In 2004, Golt became

²⁴ Response Brief at 6.

²⁵ Response Brief at 10.

²⁶ Montana State Fund's Reply Brief in Support of Motion for Summary Judgment and Brief in Opposition to Petitioner's Cross Motion for Summary Judgment (State Fund's Reply Brief), Docket Item No. 30, at 6.

²⁷ *Montana State Fund v. Zurich American Ins. Co. (In re Golt)*, 2009 MTWCC 3, ¶ 6.

an employee of Zurich's insured.²⁸ Golt continued to seek medical treatment for back pain under her 1993 industrial injury claim.²⁹ Eventually, State Fund became convinced that Golt's medical condition could no longer be attributable to her 1993 industrial injury claim.³⁰ It paid her medical benefits under a reservation of rights and sought indemnification from Zurich.³¹

¶ 28 From the evidence presented in *Golt*, I came to the conclusion that the claimant's condition was neither a natural progression of her 1993 industrial injury nor an occupational disease claim stemming from her work at Zurich's insured.³² While I concluded that neither insurer was liable to Golt for her ongoing low-back problems, I further concluded that Zurich was not entitled to indemnification from State Fund, and that State Fund was not entitled to indemnification for the medical benefits it paid to Golt.³³ I explained:

When the evidence in this matter put Respondent on notice that Claimant's condition might be related to her activities outside of her employment . . . Respondent could have . . . moved to have Claimant named as a third-party respondent. Respondent did not do so. This Court cannot now hold Claimant liable for reimbursement . . . because Claimant has the right to due process which was not afforded to her via her non-party status in the present case. Furthermore, it is not clear from the record . . . whether the mandatory mediation requirements were met

. . . Should Respondent wish to pursue reimbursement, it must file a petition naming Claimant as a party-respondent. At that time, Claimant will have been put on notice as to her potential exposure to liability and her due process rights will be satisfied.³⁴

¶ 29 As was the case with *Golt*, McKirdy is not a party to the present action. Therefore, I cannot make a ruling which affects McKirdy's interests as he is entitled to

²⁸ *In re Golt*, ¶ 29.

²⁹ *In re Golt*, ¶ 34.

³⁰ *In re Golt*, ¶ 69.

³¹ *In re Golt*, ¶¶ 8, 69.

³² *In re Golt*, ¶ 82.

³³ *In re Golt*, ¶ 94.

³⁴ *In re Golt*, ¶¶ 92-93.

due process of law. However, Hartford raises the issue of whether State Fund should be equitably estopped from refusing to indemnify Hartford for benefits Hartford paid to McKirdy under a reservation of rights. Hartford argues that it relied, to its detriment, on State Fund's representation that the only issue in dispute was not **whether** an insurer was liable for McKirdy's claim, but **which** insurer was liable for McKirdy's claim. If I determine that State Fund is equitably estopped from refusing to indemnify Hartford, the party which benefits is Hartford. Whether or not State Fund is ultimately liable for McKirdy's claim is a separate issue. I therefore consider whether equitable estoppel applies specifically regarding State Fund's refusal to indemnify Hartford.

¶ 30 In *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court stated:

As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. . . .

. . . [S]ix elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. A party must establish all six elements before the doctrine can be invoked. Equitable estoppel must be established by clear and convincing evidence.³⁵

¶ 31 The court further noted that wrongdoing is not necessary to invoke equitable estoppel. It explained:

Classically, the function of the doctrine of equitable estoppel is the prevention of fraud, actual or constructive. However, this does not imply that the party sought to be estopped must have possessed an actual

³⁵ *Selley*, 2000 MT 76, ¶¶ 9-10, 299 Mont. 127, 998 P.2d 156. (Citations omitted.)

intent to deceive, defraud or mislead the other party at the inception of the transaction.³⁶

The court noted that in modern usage, equitable estoppel is invoked to prevent an inequitable result.³⁷

1. Representation or concealment of material fact

¶ 32 To fulfill the first element of equitable estoppel, Hartford must establish the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts.³⁸ Hartford argues that State Fund knew at the outset that it potentially had a notice defense against McKirdy's claim, and yet it did not inform Hartford that it believed it might have such a defense, allowing Hartford to believe that State Fund's only defense to McKirdy's claim was that it believed McKirdy suffered an occupational disease and therefore that one or the other insurer was liable.³⁹ I find that State Fund's silence regarding this potential defense concealed from Hartford the fact that State Fund intended to defend the claim under an affirmative defense which could result in neither insurer being liable for McKirdy's claim. I conclude Hartford has established the first element.

2. Actual or constructive knowledge

¶ 33 To fulfill the second element of equitable estoppel, Hartford must establish that the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party.⁴⁰ Hartford contends that State Fund had actual knowledge of the existence of this potential affirmative defense because it knew that McKirdy was a corporate officer and therefore State Fund potentially had a notice defense under § 39-71-603(2), MCA, when it received McKirdy's FROI on November 29, 2010.⁴¹ Since it is undisputed that State Fund knew that McKirdy was a corporate officer and further knew when it received McKirdy's claim that it potentially had an affirmative defense under § 39-71-603(2), MCA, I conclude Hartford has established this element.

³⁶ *Selley*, ¶ 12. (Citations omitted.)

³⁷ *Selley*, ¶ 14.

³⁸ *Selley*, ¶¶ 9-10.

³⁹ Response Brief at 11.

⁴⁰ *Selley*, ¶ 10.

⁴¹ Response Brief at 11-12.

3. Truth unknown to the other party

¶ 34 To fulfill the third element of equitable estoppel, Hartford must establish that the truth concerning these facts must be unknown to it at the time it was acted upon.⁴² Hartford argues that it can establish this element because neither McKirdy nor Needles knew that McKirdy needed to report his industrial injury directly to State Fund within 30 days under § 39-71-603(2), MCA.⁴³ Hartford misapprehends who the “other party” is regarding its equitable estoppel argument; the “other party” is Hartford, not McKirdy. As noted above, McKirdy is not a party to this case and, if an estoppel exists, it would be as between Hartford and State Fund. I therefore conclude that Hartford has not established this element. Since a party must establish all six elements in order to establish an equitable estoppel, Hartford has failed to establish that State Fund is equitably estopped from denying Hartford indemnification in this case. Therefore, I need not reach the remaining elements of equitable estoppel.

¶ 35 Therefore, while I conclude that McKirdy suffered an industrial injury while State Fund was the insurer at risk and Hartford is therefore not liable for McKirdy’s claim, I cannot consider State Fund’s defense against McKirdy’s claim because McKirdy is not a party to this litigation. I further conclude Hartford has not proven that State Fund should be equitably estopped from refusing to indemnify Hartford for benefits it paid to McKirdy under § 39-71-407(5), MCA.

ORDER

¶ 36 Respondent’s motion for summary judgment is **DENIED**.

¶ 37 Petitioner’s cross-motion for summary judgment is **GRANTED** in part: Petitioner is not liable for the claimant’s workers’ compensation claim.

¶ 38 Petitioner’s cross-motion for summary judgment is **DENIED** in part: Petitioner has not proven its entitlement to indemnification.

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⁴² *Selley*, ¶ 10.

⁴³ Response Brief at 12.

DATED in Helena, Montana, this 1st day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kelly M. Wills/Jeffrey B. Smith
William Dean Blackaby
Submitted: June 11, 2012, and June 19, 2012

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