STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF WORKERS COMPENSATION
CLAIM NO. 0304MT0159-KE CASE NO. 1177-2010:

MONTANA INSURANCE GUARANTY ASSOCIATION,	)	
Petitioner,	)	
vs.	)	**SUMMARY JUDGMENT ORDER**
MONTANA SUBSEQUENT INJURY FUND,	)	
Respondent.	)	

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The parties have submitted this matter on stipulated facts for a ruling upon the summary judgment motion of Petitioner Montana Insurance Guaranty Association (MIGA) for reimbursement for payments MIGA made on a 2000 industrial injury claim of an injured worker who, before his 2000 injury, had obtained a certification of vocational handicap or disability from the department.

The question addressed in this order is whether MIGA is precluded from reimbursement for some of the benefits it has paid to the worker (and may pay in addition in the future) because of the absence of the Certificate of Employment in the files of the department's Montana Subject Injury Fund (SIF). More specifically, MIGA seeks summary judgment that because SIF neither asked the employer for nor sent to the employer such a certificate to be completed and returned, the absence of the certificate is irrelevant to MIGA's reimbursement right. SIF opposes the motion, and argues that the absence of the certificate precludes any such reimbursement as a matter of law.

In 1973, the Montana Legislature adopted the original version of what later became Mont. Code Ann. § 39-71-206. The version of the Workers' Compensation Act in effect as of the date of an injury applies to govern liability and entitlements for that injury. The worker whose subsequent industrial injury generated the present dispute had suffered a previous industrial injury in 1993. The original version of the statute, its amended version when the worker in this case was injured in 1993, and its

amended version when the worker in this case suffered his subsequent injury in 2000, read:

> Upon commencement of employment or retention in employment of a certified vocationally handicapped person, the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. Failure to file the required information with the certifying agency within sixty (60) days after the first day of the verified vocationally handicapped person's employment or retention in employment precludes the employer from the protection and benefits of this section unless the information is filed before an injury for which benefits are payable under this section.

Sec. 3, Ch. 254, Laws of Montana1973 [initially codified as R.C.M. 1947, 92-709.1].

> Upon commencement of employment or retention in employment of a certified vocationally handicapped person, the employer shall submit to the department, on forms furnished by the department, all pertinent information requested by the department. The department shall acknowledge receipt of the information. Failure to file the required information with the department, within sixty (60) days after the first day of the vocationally handicapped person's employment or retention in employment precludes the employer from the protection and benefits of this part unless the information is filed before an injury for which benefits are payable under this section.

Mont. Code Ann. § 39-71-206 (1993, as amended 1989 and in effect 1993).

> Upon commencement of employment or retention in employment of a certified person with a disability, the employer shall submit to the department, on forms furnished by the department, all pertinent information requested by the department. The department shall acknowledge receipt of the information. Failure to file the required information with the department, within 60 days of the person's employment or retention in employment precludes the employer from the protection and benefits of this part unless the information is filed before an injury for which benefits are payable under this part.

Mont. Code Ann. § 39-71-206 (1999, as amended 1997 and in effect 2000).

The worker involved in this case applied for and obtained a certification as a vocationally handicapped person in 1996. At the time he obtained the certification, he had already returned to work for the employer in whose employ he had suffered the 1993 industrial injury. He remained employed there after the certification.

In 2000, the same worker suffered a subsequent industrial injury for the same employer. After that injury, the worker's compensation insurer for his employer became insolvent, and MIGA assumed liability for his claim.

After it had paid 104 weeks of benefits on the claim, MIGA began submitting requests for reimbursement to SIF. SIF began denying them, because its files did not contain a certificate giving notice that the employer was retaining the worker in its employ after his vocational certification.

On November 24, 2009, SIF sent MIGA a written denial of a resubmitted reimbursement request, and a statement of the pertinent facts and salient principles, according to SIF, upon which the continued denial of the reimbursement was based – in essence, that a completed Certificate of Employment was not timely filed with SIF by the employer.

On December 14, 2009, MIGA submitted a petition for mediation of its reimbursement request to the department's Workers' Compensation Mediation Unit. On December 17, 2009, WCMU issued its Order of Dismissal of that petition, which was served by mail upon the parties on December 18, 2009. On January 19, 2010, the department's Hearings Bureau received MIGA's Petition for Contested Case regarding its asserted right to reimbursement. The parties mutually agreed to stipulated facts (the pertinent of which are contained in this order), upon which MIGA made its motion for summary judgment. All briefs have been filed and served, and oral argument waived.

The only issue presented by the summary judgment motion is whether the statute requires SIF to ask the employer for the requisite notice by furnishing the appropriate form to the employer, before the employer's affirmative responsibility to file notification of employment or retention of the worker with the certification applies. With any or all of the relatively minor and irrelevant amendments made during its life, the statute cannot reasonably be read to impose such a duty upon SIF.

The language of the statute at issue, throughout its life and as it applies in this case, requires that the employer take affirmative action to notify the responsible entity of state government about its employment or retention of a worker who has the relevant vocational certification. The employer has the affirmative responsibility to file that notification within 60 days of the first day of employment or retention.

If it does not timely file that notification, it loses the protection and benefits of the law, unless it files the notification after the 60 days but still before any injury to the worker for whom benefits are payable.

From the facts upon which the parties have agreed for purposes of this motion, the employer never did file the notification of employment or retention of this particular worker with the relevant vocational certification, either within 60 days after employment or retention in 1996, or before the subsequent injury in 2000.

Beyond any question, there are two clear deadlines for the employer's filing of the requisite notice to SIF, to preserve its protection and benefits under the provisions of the Subsequent Injury law. First, the statute always required that the employer file that notice within 60 days after the first day of the certified worker's employment or retention in employment after certification, or it would lose its protection and benefits under the subsequent injury law. Second, when the employer did miss that deadline, it could still save its protection and benefits by filing the notice late, but still before the worker suffered an injury for which benefits were payable under the Workers' Compensation Act.

The way in which the statute states these two deadlines precludes the reading of the statute urged by MIGA. Neither deadline is at all related to when or whether SIF sends to the employer its form for notification of employment or retention, asks the employer for the notification, or asks the employer for any other information about the certified worker or the worker's employment.

It makes no sense to read the statute to require action by SIF as a precondition to the employer's affirmative responsibility to file the notification. If that was the Legislature's intent, the 60 days for filing would necessarily start when SIF took the requisite action, and not on the first day of the employment or retention of the worker after vocational certification.

The Legislature knows how to write a statute setting a time, after a specific event or act, within which to file a notice. Every statute on the books that sets a deadline for an appeal or a request for administrative review involves such a deadline, and specifies the event or act that commences the running of the time within which the filing must be made. In this statute, the Legislature adopted and kept, for the life of the statute, an initial deadline, at 60 days after the first day of employment or retention after vocational certification, for filing the employer's notification of that employment or retention. By the plain language of the statute, that time began to run on that day, without regard to whether or when SIF furnished (provided or made available) the form in which it wanted the notice filed, thereby specifying the information necessary for the employer to submit.

Grammatical construction of the statute supports this decision. There are two required actions: (1) The employer "shall" file the notification within 60 days after employment or retention of the vocationally certified worker. (2) SIF "shall" acknowledge receipt of the notification. With regard to the employer's affirmative responsibility for filing the notification, the employer is advised that it must file the notification on forms furnished by SIF, and the "forms" are described as requiring (by setting forth what information the employer must fill in to complete the form) "all pertinent information requested by the department." The sentence cannot reasonably be read to mean that "all pertinent information requested by the department" somehow modifies either "the employer shall submit" or the day the 60-day period within which to file the notification begins.

No matter what theory MIGA advances, distinguishable or not from the holding in *St. Paul Fire and Marine Insurance Co. v. Subsequent Injury Fund*, 1998 MTWCC 10, its efforts fail to shift to SIF the initial burden to take action about notification of the employer's hiring or retention of the certified worker. Even the second deadline, clearly a safeguard for the benefit of the employer, is stated without regarding to whether SIF has furnished the forms. Instead the second deadline allows an employer who fails to file the notification within 60 days of hiring or retaining the worker still to reap the benefits of hiring or retaining the work if it files the information before the worker suffers a subsequent industrial injury for which benefits are payable.

There was a fail safe provision in the statute, requiring that SIF acknowledge receipt of the employer's notification. Lack of that acknowledgment of receipt would alert an employer that had sent in the notification that it needed to check and assure that SIF had received the notification. Consistent with the Hearing Officer's reading of the statue, that fail safe provision did not toll or extend either of the deadlines for filing the notice.

Summary judgment that MIGA is entitled to reimbursement is denied. As a matter of law, failure of MIGA to file the notification of employment or retention of the worker after vocational certification, either within 60 days after certification or before the 2000 subsequent industrial injury, precludes reimbursement of MIGA under Montana's applicable subsequent injury law, whether or not SIF sent the forms for that notification to the employer.

The Hearing Officer empathizes with MIGA's dilemma. It inherited this liability when the actual insurer for the employer of this particular worker went defunct. The statute places the affirmative responsibility for filing notice of employment or retention of the certified worker upon the employer, not the insurer. Nonetheless, the failure of the employer, for purposes of this summary judgment

motion, to file the notification with SIF defeats the employer's insurer's successor in liability from obtaining reimbursement from SIF for the benefits paid.

DATED this 22nd day of September, 2010.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ TERRY SPEAR
Terry Spear
Hearings Bureau