

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 64

WCC No. 9412-7192

**DANIELA BLOWERS, individually and on behalf of
GALEN LEE BLOWERS, II, a minor**

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer for

POOL WELL SERVICING COMPANY

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Widow seeking lump sum conversion of all future workers' compensation benefits for herself and her son seeks partial summary judgment addressing two questions: (1) whether she can lump sum more than two years of benefits and (2) whether the insurer should be ordered to advance monies to pay for further studies concerning her proposed business plan.

Held: While section 39-71-721, MCA (1985), provides that a lump sum of two years of benefits must be paid to a widow who remarries, with no further benefit entitlement, that section does not limit the conversion of benefits corresponding to more than two years in a situation where remarriage has not occurred. Section 39-71-741(1), MCA (1985) provides that "biweekly benefits...may be converted, in whole or in part, into a lump-sum payment." In considering the widow's request for an order that benefits be converted, the Court will consider the rule of section 39-71-721, MCA (1985), but there is no per se ban on lump-sum conversion of more than two years of benefits. While the WCC has jurisdiction to consider claimant's request for an advance for a business plan study, she has not provided sufficient factual basis for such an order at this point.

Topics:

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:
Section 39-71-721, MCA (1985).** While section 39-71-721, MCA (1985), provides

that a lump sum of two years of benefits must be paid to a widow who remarries, with no further benefit entitlement, that section does not limit the conversion of benefits corresponding to more than two years in a situation where remarriage has not occurred. Section 39-71-741(1), MCA (1985) provides that "biweekly benefits...may be converted, in whole or in part, into a lump-sum payment." However, in considering the widow's request for an order that benefits be converted, the Court will consider the rule of section 39-71-721, MCA (1985) and the possibility of remarriage.

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Section 39-71-741(1), MCA (1985). While section 39-71-721, MCA (1985), provides that a lump sum of two years of benefits must be paid to a widow who remarries, with no further benefit entitlement, that section does not limit the conversion of benefits corresponding to more than two years in a situation where remarriage has not occurred. Section 39-71-741(1), MCA (1985) provides that "biweekly benefits...may be converted, in whole or in part, into a lump-sum payment." However, in considering the widow's request for an order that benefits be converted, the Court will consider the rule of section 39-71-721, MCA (1985) and the possibility of remarriage.

Benefits: Lump Sums: Generally. While section 39-71-721, MCA (1985), provides that a lump sum of two years of benefits must be paid to a widow who remarries, with no further benefit entitlement, that section does not limit the conversion of benefits corresponding to more than two years in a situation where remarriage has not occurred. Section 39-71-741(1), MCA (1985) provides that "biweekly benefits...may be converted, in whole or in part, into a lump-sum payment." However, in considering the widow's request for an order that benefits be converted, the Court will consider the rule of section 39-71-721, MCA (1985) and the possibility of remarriage.

Benefits: Lump Sums: Feasability Studies. While the WCC has jurisdiction to consider claimant's request for an advance for a business plan study, she has not provided sufficient factual basis for such an order at this point.

The petitioner in this case, Daniela Blowers (Daniela), is the widow of Galen Lee Blowers. Mr. Blowers died on May 8, 1985, in an industrial accident. He is survived by Daniela and a son, Galen Lee Blowers, II (Galen Jr.). Galen Jr. was born posthumously on October 31, 1985.

Since Galen's death, Daniela and Galen Jr. have been receiving the death benefits specified in section 39-71-721, MCA. Those benefits have been paid biweekly.

Through her present petition, Daniela seeks a lump sum conversion of all future benefits. According to the insurer, the amount requested by Daniela is nearly three-quarter of a million dollars, to be exact, \$655,000. (Pool Well's Response to Motion for Declaratory Ruling at 3.)

Recognizing that there are serious issues of law attendant to her request, and that her justification for a lump sum is presently inadequate, Daniela has filed a pretrial motion requesting the Court to issue a declaratory ruling regarding two matters. First, she requests the Court to rule that she can lump sum more than two years of benefits. Second, she asks the Court to order the insurer to advance her monies to pay for further studies concerning a proposed business plan. Her motion has been briefed and is ready for decision.

Discussion

1. The motion is treated as one for partial summary judgment.

A declaratory judgment is appropriate where the issues involve a declaration of "rights, status, and other legal relations." § 27-8-201, MCA. Through her petition Daniela seeks a judgment ordering the insurer to pay benefits in a lump sum. Through her present motion, she also seeks an order directing the insurer to pay for business feasibility studies.

Thus, more than a mere declaration of rights is involved.

Partial summary judgment is, however, appropriate. Partial summary judgment is an appropriate device to resolve preliminary issues of law which do not involve factual disputes. See *Marriage of Meeks*, 915 P.2d 831, 835-36 (Mont. 1996). Therefore, Daniela's motion is treated as one for partial summary judgment.

2. The issues raised by the motion.

The first issue raised by Daniela's motion concerns the power of the Court to order the lump-sum payment of more than two years of benefits. The issue arises on account of section 39-71-721, MCA, which provides that upon remarriage a widow is entitled to a lump-sum payment which equals two years of benefits, but to nothing further. Thus, remarriage cuts off all future benefits. In requesting a lump sum based on her life expectancy, Daniela is asking the Court to assume that she will never remarry.

Daniela's lump-sum request is based on her existing indebtedness, a business venture, proposed educational expenditures, dental expenses, and a proposed home purchase. See attachment to Pool Well's Response to Motion for Declaratory Ruling. In her second request for declaratory ruling, Daniela asks for an advance of monies to pay for a market study and to retain professionals to prepare a formal business plan, conduct vocational testing, obtain educational instruction, and to consult with financial planners pursuant to section 39-71-741(3), MCA (1985), and Rule 24.29.1204 ARM. (Motion for Declaratory Ruling and Brief at 1.) Daniela concedes that she does not currently have sufficient

documentation to justify the business venture. (*Id.* at 6.) However, she believes that further professional studies and educational assistance will provide that justification. Since she is unable to pay for those studies and assistance, she requests the Court to order the insurer to pay for them. That request is made pursuant to section 39-71-741(3), MCA (1985).

With respect to the second request, the insurer argues that the Court lacks jurisdiction to order it to pay for feasibility studies. It contends that only the Department of Labor and Industry (Department) has jurisdiction to entertain Daniela's request.

3. Applicable law.

The pending motion is based on sections 39-71-741 and 39-71-721, MCA. Following the rule that the law in effect at the time of the injury governs the worker's entitlement to benefits, *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), the Court must initially determine which versions of these statutes were in effect when Galen was killed.

Section 39-71-741, MCA, was amended in 1985. 1985 Mont. Laws, ch. 471, § 1. Ordinarily, amendments to the Workers' Compensation Act have been made effective on July 1. However, in this case the legislature expressly provided that the amendment was effective upon passage and approval. *Id.* at § 7. Since the amendment was approved on April 15, 1985, the 1985 version of the section applies in this case.

Section 39-71-721, MCA, was not amended in 1985. Therefore, the 1983 version applies but since that version is the same as in 1985 the Court will refer to the applicable section as section 39-71-721, MCA (1985).

4. The two-year issue.

Section 39-71-721, MCA (1985), provides in relevant part:

(5) . . . Death benefits must be paid to a widow or widower for life **or until remarriage, and in the event of remarriage, 2 years' benefits must be paid in a lump sum to the widow or widower.** [Emphasis added.]

The section is significant in the context of the present case because it provides for a cut-off of biweekly benefits upon a widow's remarriage, limiting her benefits upon remarriage to a lump sum which is equivalent to two years of biweekly benefits. According to the insurer's calculation, Daniela's lump-sum request amounts to 43.92 years of biweekly benefits. If the Court ordered the lump sum and Daniela immediately remarried, the insurer would have to attempt to recoup an overpayment equivalent to 41.92 years of benefits.

Daniela points out, however, that the statute applicable to lump sums does not limit her to two years of benefits. In that regard, she is correct. Section 39-71-741(1), MCA (1985), provides that the "biweekly payments provided for in this chapter may be converted, **in**

whole or in part, into a lump-sum payment." (Emphasis added.) By specifically providing that the lump sum amount shall be based on "the most recent table of life expectancy in years as published by the United States national center for health statistics," the section acknowledges that in cases of permanent total disability there is uncertainty concerning the duration of prospective benefits. *Id.* While providing guidance concerning conversion of permanent total disability benefits, the section does not provide any guidance with respect to the remarriage contingency in death benefit cases.

This Court, as other courts, is prohibited from inserting additional provisions into a statute. *Murer v. State Compensation Mut. Ins. Fund*, 267 Mont. 516, 520, 885 P.2d 428, 430 (1994). Thus, I decline to read section 39-71-741, MCA, as precluding me from awarding more than two years of death benefits to a widow.

However, section 39-71-721, MCA, and prior decisions of this Court and the Supreme Court, clearly require that in considering a widow's lump-sum request I should consider the two-year benefit limitation which arises upon remarriage. An insurer is entitled to recoup any lump-sum advance from future benefits payable to the claimant. *Wray v. State Compensation Ins. Fund for Harp Line Const. Co.*, 266 Mont. 219, 879 P.2d 725, 726 (1994); *Hedegaard v. Knife River Coal Min. Co.*, 238 Mont. 290, 293, 776 P.2d 1225, 1227-28 (1989); and *Stanley Structures v. Scribner*, 253 Mont. 236, 239-40, 833 P.2d 166, 168-69 (1992). Thus the uncertainty as to a worker's future entitlement to benefits is a factor which must be considered when awarding a lump sum.

In *Swan v. Sletten Construction Co.*, 223 Mont. 477, 726 P.2d 1170 (1986), the Supreme Court affirmed a decision of this Court refusing a claimant's request for a lump sum to pay attorney fees with respect to all future benefits she might receive. That case involved widow's benefits. The claim was denied by the insurer. Claimant petitioned this Court which found the claim compensable. Based on that adjudication the claimant asked this Court to lump sum attorney fees with respect to her entire potential entitlement. The requested attorney fees amounted to \$200,793.92 and were based on the widow's projected lifetime benefits of \$607,637.66. *Id.* at 479, 727 P.2d at 1172. This Court declined the request, awarding instead a lump-sum attorney fee based on benefits already paid and the two years of benefits which would be payable upon the widow's remarriage. *Id.* The Court stated that if the widow did not marry within two years, her counsel could petition for additional fees. *Id.* The Supreme Court affirmed, observing:

We do not agree that counsel is now entitled to over \$200,000 in fees on the possibility that appellant will collect benefits the next 44 years because benefits to appellant will cease if she remarries or dies.

Id. at 480, 726 P.2d at 1172. Thus, the Supreme Court has recognized that contingencies, such as remarriage and death, are factors which this Court must consider in connection with a lump-sum request.

Other cases support the holding in *Swan*. In *Wood v. Ulmer's Car and Truck*, 236 Mont. 353, 360, 769 P.2d 1264, 1268 (1989), the Supreme Court similarly denied a lump-sum request for attorney fees on future benefits. It held that "[t]he lower court acts reasonably and within its discretion by refusing to lump sum attorney fees owed for benefits which may never accrue." *Id.* (citation omitted). In *Davis v. Jones*, 229 Mont. 158, 162-63, 745 P.2d 362, 365 (1987), the Court reached the same conclusion:

However, as stated in *Swan*, if the lower court denies a lump sum fee request on the basis that claimant seeks a percentage of benefits claimant may never receive, we will not overturn the decision as unreasonable. *Swan*, 726 P.2d at 1173. Claimant here seeks fees derived from benefits she will not receive if she remarries or dies. Thus, the refusal to grant fees in a lump sum beyond two years was reasonable, and we affirm on this issue.

Thus, while Daniela is not limited to lump summing of only two years of benefits, the possibility that she might remarry is a significant factor I must take into consideration when determining whether a lump sum of more than two years of benefits is appropriate.

5. Jurisdiction of the Workers' Compensation Court to consider the request for funds to pay for feasibility studies.

Daniela's request for funds to pay for feasibility studies is based on section 39-71-741(3), MCA (1985). That section provides:

(3) If the division finds that an application for lump-sum conversion does not adequately demonstrate the ability of the worker or his beneficiary to sustain himself financially, the division may order, at the insurer's expense, financial, medical, vocational rehabilitation, educational, or other evaluative studies to determine whether a lump-sum conversion is in the best interest of the worker or his beneficiary.

The "division" referred to in the 1985 statute was the Division of Workers' Compensation. The division was eliminated in 1989 and its responsibilities transferred to the Department of Labor and Industry. 1989 Montana Laws, Ch. 613. Thus, any authority the Division had under subsection (3) was transferred to the Department.

The insurer in this case argues that the claimant's request for monies to fund feasibility studies should be addressed to the Department. It does not argue that the provision is inapplicable. It only contests the Court's jurisdiction to make an award under the section.

Daniela argues that despite the jurisdiction vested in the Division (and later the Department), the Court nonetheless has jurisdiction to order the insurer to advance funds for feasibility studies. She cites *Carlson v. Cain*, 216 Mont. 129, 700 P.2d 607 (1985), as supporting her contention.

In *Carlson* the Supreme Court addressed an assertion that the Workers' Compensation Court lacked jurisdiction to determine the hourly amount payable for domiciliary care. Neither party contested the Court's jurisdiction to determine that domiciliary care was reasonable and necessary, or that the insurer was responsible for such care. But the statute relating to medical care provided that domiciliary care had to be approved by the Division of Workers' Compensation and the insurer argued that the amount payable for domiciliary care should be determined, in the first instance, by the Division. *Id.* at 140, 700 P.2d at 316. The Supreme Court rejected the argument, holding:

The Court found and the parties agree that the services Mrs. Ebert provided for her daughter passed the above test.

The Workers' Compensation Court, however, ruled that it did not have jurisdiction to set a value on the services performed by Mrs. Ebert. The court ruled that the services constituted "such other treatment" under section 39-71-704, MCA, which we have quoted above, and as such the services must be approved by the Division of Workers' Compensation. The court left the decision of how much should be paid to Mrs. Ebert to the Division upon presentation to the Division of additional evidence.

Claimant contends that the Workers' Compensation Court has the power to evaluate the services and make an award. Hartford claims that the amount of each award for domiciliary services in each case must be determined by the Division.

The portion of section 39-71-704, MCA, which is applicable is that the employer must pay medical benefits for doctors, surgeons and hospitals and for "such other treatment as may be approved by the Division for the injuries sustained." A literal reading of that portion of the Act would indicate that the "other treatment" to be compensable must be approved by the Division. Yet, in this case, the Workers' Compensation Court determined that the "other treatment" was necessary as a medical expense but declined to set the dollar amount.

Section 39-71-2905, MCA, relates to the jurisdiction of the Workers' Compensation judge. In pertinent part, it provides:

" . . . If the dispute relates to benefits due a claimant under chapter 71, the judge shall fix and determine any benefits to be paid and specify the manner of payment. The workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under chapter 71. . . . "

The foregoing portion of section 39-71-2905, MCA, is an excellent example of the legislature using interchangeably the term "compensation" and "benefits." It is also an affirmation of the legislative purpose to grant to the Workers' Compensation judge "exclusive jurisdiction" in all matters relating to benefits recoverable under the

Workers' Compensation Act. Medical payments constitute one form of such benefits. It is the policy of the law to avoid multifariousness in litigation. All issues involved in lawsuits should be tried in one trial. **We, therefore, hold that once the Workers' Compensation Court has acquired jurisdiction of a dispute under the Act, it has jurisdiction to try and decide all of the issues that arise between the parties before him.** In this case, the Workers' Compensation Court should have fixed a dollar amount of the domiciliary care to which the Workers' Compensation judge found that claimant Carlson was entitled.

We do not know from the record before us the exact status of the claim for Carlson's claim for domiciliary care. If, following the Workers' Compensation order in this case, the Division is now considering that issue, then we order that the Division continue to consider and make a decision as to the dollar amount due Carlson subject to Carlson's right of appeal to the Workers' Compensation Court on that issue. If, however, the matter has not been referred to the Division, or is not being considered by the Division, then we remand the issue to the Workers' Compensation Court for the fixing of the dollar amount of domiciliary care.

Id. at 140-41, 700 P.2d at 614-15 (emphasis added).

The lump-sum request in this case is not based solely on Daniela's business proposal. It is based on other factors, including her indebtedness and her need for a secure and appropriate residence. Her lack of employment experience and education, thus her dependency on her death benefits, presents a prima facie case for a lump sum calculated to enhance her earning ability. I doubt that anyone would seriously challenge her contention that inflation has seriously eroded the value of her biweekly benefits.

The insurer has denied Daniela's lump-sum request. In light of that denial, this Court has jurisdiction to consider her request. § 39-71-2905, MCA. Pursuant to *Carlson*, the Court also has jurisdiction to determine issues which attend that request. Therefore, I find that I have jurisdiction to consider her request that the insurer be ordered to pay for feasibility studies.

However, I do not have at this time a sufficient factual basis to order the insurer to pay for the additional studies. The insurer's response indicates that Daniela presently lacks the skills to operate the business she proposes to buy. The Court, however, has not been furnished with sufficient information for it to determine whether further evaluation and training is necessary or appropriate. The business proposal also needs further evaluation, but the Court has not been provided sufficient information which would indicate that the feasibility studies are worth pursuing.

Partial Summary Judgment

Based on the foregoing discussion, the Court enters the following partial summary judgment:

1. The petitioner, Daniela Blowers, is not limited to a lump sum of two years of benefits. However, the limitation of section 39-71-721, MCA, to two years of widow's benefits following remarriage is a significant factor which must be considered by the Workers' Compensation Court in determining whether a lump sum exceeding two years of benefits is appropriate.
2. The Workers' Compensation Court has jurisdiction to consider petitioner's request for monies to pay for feasibility studies and educational evaluation. However, petitioner has not provided sufficient, undisputed facts to support her request. Therefore, her request must be considered after an evidentiary hearing.
3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 15th day of October, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Martin

Mr. Barry G. O'Connell

Mr. Geoffrey R. Keller

Submitted Date: September 5, 1996