

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 68

WCC No. 9604-7536

THEDA BEA BOULDIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BIG SKY CARVERS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant has been diagnosed with fibromyalgia and the insurer accepted her condition as an occupational disease related to her employment painting decoy ducks. In a prior decision, the WCC held the insurer could not withdraw that acceptance to challenge claimant's condition. Now at issue is claimant's request for benefits under section 39-72-405, MCA (1993), which allows an award of up to \$10,000 when an occupationally diseased claimant suffers a wage loss and meets certain statutory conditions.

Held: Claimant easily meets three of four statutory criteria: she suffers from an occupational disease, she is not totally disabled, and she has a wage loss where she was forced to work part-time only as a result of her condition, then terminated employment following a dispute with her employer over hours of work. The final criteria involves interpretation of the statute as to whether a determination by a medical panel is necessary regarding whether it was medically advisable for claimant to transfer from her job as a result of her condition. Though the statute is not a model of clarity, the Court interprets section 39-72-405, MCA (1993) to require a medical panel determination only when the wage loss results from a cessation of employment by the employee (resignation), not from discharge or transfer. As for the amount of the award, the full \$10,000 is awarded where claimant's wage loss is \$2038.40 annually if her current new-job wages are compared to her time-of-injury wages, and \$7,600 annually if the part-time wages she earned post-injury with the time-of-injury employer are compared to full time wages she would have earned but for the disease.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-405, MCA (1993). Claimant, whose fibromyalgia condition was accepted by the insurer as an occupational disease, seeks compensation under section 39-72-405, MCA (1993) for wage loss allegedly resulting from her inability to work full time in her time-of-injury job. Claimant easily meets three of four statutory criteria: she suffers from an occupational disease, she is not totally disabled, and she has a wage loss. The final criteria involves interpretation of the statute as to whether a determination by a medical panel is necessary regarding whether it was medically advisable for claimant to transfer from her job as a result of her condition. Though the statute is not a model of clarity, the Court interprets section 39-72-405, MCA (1993) to require a medical panel determination only when the wage loss results from a cessation of employment by the employee (resignation), not from discharge or transfer. As for the amount of the award, the full \$10,000 is awarded where claimant's wage loss is \$2038.40 annually if her current new-job wages are compared to her time-of-injury wages, and \$7,600 annually if the part-time wages she earned post-injury with the time-of-injury employer are compared to full time wages she would have earned but for the disease.

Occupational Disease: Indemnity (39-72-405) Awards. Claimant, whose fibromyalgia condition was accepted by the insurer as an occupational disease, seeks compensation under section 39-72-405, MCA (1993) for wage loss allegedly resulting from her inability to work full time in her time-of-injury job. Claimant easily meets three of four statutory criteria: she suffers from an occupational disease, she is not totally disabled, and she has a wage loss. The final criteria involves interpretation of the statute as to whether a determination by a medical panel is necessary regarding whether it was medically advisable for claimant to transfer from her job as a result of her condition. Though the statute is not a model of clarity, the Court interprets section 39-72-405, MCA (1993) to require a medical panel determination only when the wage loss results from a cessation of employment by the employee (resignation), not from discharge or transfer. As for the amount of the award, the full \$10,000 is awarded where claimant's wage loss is \$2038.40 annually if her current new-job wages are compared to her time-of-injury wages, and \$7,600 annually if the part-time wages she earned post-injury with the time-of-injury employer are compared to full time wages she would have earned but for the disease.

The matter before the Court is the second of two petitions filed by petitioner, Theda Bea Bouldin (Theda).

Theda suffers from fibromyalgia. In her first petition to this Court, she sought a ruling that she is entitled to occupational disease benefits on account of her condition. Liberty Northwest Insurance Corporation (Liberty) had accepted her fibromyalgia claim, but thereafter changed its mind and denied liability. In an October 8, 1996, Partial Summary Judgment and Decision, I determined that lacking proof of fraud, mutual mistake, subsequent injury, or some other sufficient legal ground, Liberty's acceptance of Theda's claim for occupational disease benefits on account of her fibromyalgia precluded it from thereafter contesting its liability for that condition. That determination was certified as final and was not appealed.

On May 21, 1997, Theda filed a second petition. That petition was also captioned "Petition for Hearing," but the Court gave it the same docket number. The second petition and subsequent documents are found in Volume II of the Court file.

In her second petition, Theda requests benefits under section 39-72-405, MCA (1993).

Liberty resisted the second petition, and the matter went to trial on August 25, 1997, in Helena, Montana. Theda represented herself and was sworn and testified. Liberty was represented by Mr. Larry W. Jones (Larry). Exhibits 3, 5, 6 and 8 through 12 were admitted without objection. The Court reserved ruling on the offers of Exhibits 1, 2, 4 and 7.

In addition to Theda's testimony and exhibits, the parties agreed that the Court may consider Theda's prior depositions and depositions of Drs. James R. Burton, Robert E. Chambers, Duane Mohr, Herbert E. Prussack, Leonard R. Ramsey, and George Saari; James Deming, Ed.D.; Ginny Dieruf; Gregory P. Hoell, D.C.; and Joseph K. McElhinny, Psy.D.

The Court provided the parties an opportunity for post-trial briefs. The final brief was submitted on September 10, 1997, at which time the case was deemed submitted.

Having considered the testimony at trial, the depositions, the exhibits, and the arguments of the parties, the Court makes the following :

FINDINGS OF FACT

1. Initially, as a matter of fact, the Court complements both Theda and Larry on their cooperation and the manner in which they presented this case to the Court. Larry never attempted to take advantage of the fact that Theda is unrepresented. He has been helpful to her and the Court throughout this proceeding. He has set a good example for other lawyers who may become involved in pro sé matters. On her part, Theda has represented herself in a reasoned and rationale manner. She has complied with the Court's procedural rules. In all proceedings before the Court, she has been poised and articulate.

2. Claimant has suffered from fibromyalgia since at least early 1995. In early 1995 she submitted a claim for compensation which Liberty accepted as an occupational disease.

3. In 1995 claimant was working for Big Sky Carvers. Her job entailed painting animal decoys, mostly ducks. The decoys varied in size from life-size ducks to miniatures. She was provided finished, painted decoys as guides to her painting.

4. As a result of her condition, Theda was off work from March until late May 1995.

5. Dr. Leonard Ramsey, who is a family practitioner, is claimant's treating physician.

6. At the end of May 1995, Theda returned to work with a release from Dr. Ramsey. In releasing claimant to work, Dr. Ramsey wrote:

In my experience with cases such as Theda's, I often find they must modify their work schedule, work environment, and work load significantly in order to avoid severe headaches and pain. I will not be able to predict to a high degree of certainty what her work schedule may ultimately look like, but I would suspect that 3 days a week at 4 to 6 hours a day would be the maximum that Theda might be able to undertake at her old job. And, she would have a requirement for very frequent breaks where she could get up and stretch and move about in order to avoid aggravation of the fibromyositis.

I understand Theda is going to try to return to work this Friday, the 26th of May. Might I suggest initially that she work only 2 hours a day, that she takes a break every half-hour for at least 10 minutes and get up and move around, free herself of her work area and position. After the 1st 2 to 3 days of work at this very limited schedule, it may be appropriate to advance her to 4 hours per day, again with every half hour a 10 minute break, keeping a careful eye on how her pain responds in an overall sense.

(Ex. 2.)

7. Theda returned to work full time in the fall of 1995. However, she continued to experience pain from her fibromyalgia. Dr. Ramsey recommended that, within her normal 40-hour work week, she be allowed time off for doctors' appointments.

8. On January 4, 1996, Theda received a written warning from Deanna J. Field (Field), comptroller and personnel manager of Big Sky Carvers. The warning concerned her absences from work. (Ex. 8.) The memo indicated that the absences were unexcused.

9. Sometime thereafter, Theda experienced increased pain while lifting a box. Dr. Ramsey took her off work for two weeks.

10. On February 29, 1996, Theda received another written warning concerning time off. The warning noted that Theda was seeing a physical therapist but asked that she reschedule her appointments after her regularly scheduled shift. (Ex. 10.) The warning went on to state,

"I expect you to take whatever steps are necessary to be actively at work for as many hours per day and per week as is possible."

11. On March 8, 1996, Dr. Ramsey wrote that Theda "[m]ay return to work part time only - i.e. - 4 hour days /5 days wk or 6 hour days/3 days per week. I do not anticipate her being able to work full time in the foreseeable [sic] future." (Ex. 3.)

12. Theda initially received approval from her immediate supervisor to work three non-consecutive days. Thereafter, a dispute arose between Theda and Field concerning her work schedule. While acknowledging that claimant was limited to part-time work, Field insisted that claimant work five consecutive four hour days. She thereafter relented and approved three, six hour days but insisted that they be worked consecutively.

13. Theda terminated her employment with Big Sky Carvers because of the dispute over her work days.

14. Big Sky Carvers did not dispute Dr. Ramsey's restriction of Theda to work part time.

15. Theda thereafter sought other employment. On April 22, 1996, she was employed by Northern Line Layers (Northern), a construction company which specializes in the laying of underground pipe.

16. Theda works as a secretary for Northern. She is a full-time employee, although she has lost work on account of the seasonal nature of the business and a contract dispute between Northern and its major customer. Claimant's hours are flexible. She is not directly supervised.

17. At the time Theda terminated her employment with Big Sky Carvers, Theda was earning \$7.33 an hour. Her initial wage at Northern was \$7.00 an hour. In July 1997, she received a raise to \$7.25 an hour.

18. Big Sky Carvers gave its employees regular raises. Theda believes that she would presently be making \$8.66 an hour if still working for Big Sky Carvers. Field opined that claimant would be at \$8.23 an hour if still working for the company. I find \$8.23 to be a more realistic estimate.

19. Theda is presently earning \$7.25 an hour with Northern Line Layers.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter. *John A. Gomez v. Montana Municipal Insurance Authority*, WCC No. 9411-7177 (January 27, 1995).

2. Liberty objected to Exhibits 1, 2 and 4 on relevancy grounds. At the time of trial, the Court reserved its ruling on the objections. Having now read the exhibits and considered the context in which they are offered, I find Exhibits 1, 2, and 7 are relevant to claimant's

entitlement under section 39-72-405, MCA. Those exhibits are therefore admitted and have been considered by the Court in reaching its decision. Exhibit 4 is not relevant and has been disregarded.

3. This Court has previously determined that Theda's entitlement to benefits is determined by the 1993 version of the Occupational Disease Act (ODA). Order Regarding Applicable Law (March 4, 1997).

4. The ODA makes no provision for permanent partial disability benefits. It does, however, provide a special benefit for workers who are disabled from their usual occupation. Section 39-72-405(2), MCA (1993), provides:

39-72-405. General limitations on payment of compensation.

. . . .

(2) When an employee in employment on or after January 1, 1959, because the employee has an occupational disease incurred in and caused by the employment that is not yet disabling, is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is in fact, as determined by the medical panel, inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding \$10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.

Theda is seeking the maximum benefit permitted by the section.

5. As an initial matter, Theda must establish that she is eligible for the benefit. The elements she must satisfy are as follows:

(1) She must suffer from an occupational disease. It has previously been determined that she does.

(2) She must not be totally disabled as a result of her injury. This element is not in dispute as she continues to work.

(3) She must either have been discharged or transferred "from the employment in which . . . she is engaged" or cease employment **and** it must be determined by a medical panel that her occupational disease makes it inadvisable for her to continue in the employment. This element requires further discussion.

(4) She must suffer a wage loss. She has satisfied this element.

The third element is the only element that warrants further discussion.

Since no medical panel opinion was presented, the Court must determine whether a medical panel opinion is a prerequisite to Theda's claim. Unquestionably, the panel requirement applies if her claim is based on her ceasing employment. However, if her claim is based on a discharge or transfer, then the Court must determine whether the panel requirement is applicable. If the panel requirement is not applicable to a discharge or transfer, then the Court must determine if claimant was discharged or transferred within the meaning of the statute.

6. The meaning of a statute must be gleaned, if possible, from the statute itself. If the statute is plain and unambiguous on its face, it must be construed and applied as written. *Boegli v. Glacier Mountain Cheese Co.*, 230 Mont. 426, 429, 777 P.2d 1303, 1305 (1989). The statutory construction issue in this case is whether the medical panel proviso applies to just a cessation of work or applies as well to a discharge or transfer.

In interpreting statutes, courts ordinarily apply ordinary rules of grammar. *State ex rel. Daly v. Montana Kennel Club*, 144 Mont. 377, 381, 396 P.2d 605, 607 (1964.) The rule, however, is flexible:

In construing a statute, courts must first resort to the ordinary rules of grammar, and in the absence of a clear contradictory intention disclosed by the text, must give effect to the legislative intent according to those rules, and according to the natural and most obvious import of the language, without resorting to subtle and forced construction to limit or extend their operation.

Doull v. Wohlschlager, 141 Mont. 357, 365, 377 P.2d 758, 764 (1963).

The section is one long, compound sentence with multiple verbs, subjects, conjunctions and clauses. Diagraming the sentence, even if it were within my abilities, would be nightmarish. My own experience with the legislative process suggests that grammarians are rarely, if ever, consulted when drafting statutes. My initial analysis of the sentence suggests that it is grammatically incorrect in any event.

One principle of statutory interpretation that could guide my construction is the rule that ". . . a relative clause must be construed to relate to the nearest antecedent that will make sense." *Dussault v. Hjelm*, 192 Mont. 282, 285, 627 P.2d 1237, 1239 (1981) (quoting from *State v. District Court of the First Judicial Distr.*, 103 Mont. 487, 501, 63 P.2d 141, 144 (1936); *State v. Centennial Brewing Co.*, 55 Mont. 500, 513, 179 P. 296, 298 (1919).). Applying that principle literally would require that the requirement for a medical panel opinion be limited to cessation of employment since that is the clause which immediately precedes the requirement. But the cited cases deal with instances not involving the type of sentence at issue herein, and I decline to read the principle rigidly or out of the contexts in which it has been applied.

Nonetheless, I interpret the medical panel provision as applying to a cessation (resignation) of employment by the employee and not to a termination or transfer of the employee by the employer. In simplified form, the section provides, "When an employee . . . is discharged or transferred . . . or when the employee ceases employment" § 39-72-405(2), MCA, (1993), emphasis added. The medical panel requirement is part of the second "when" clause. Limiting the panel requirement to that clause is logical. Where an employee is transferred or terminated by the employer, there is less likelihood that the employee is working at less than her capabilities. On the other hand, a cessation or termination of employment by the employee may or may not be due to physical limitations attributable to the occupational disease.

7. Theda ultimately terminated her employment; however, by that time she had already been restricted to part-time work and the restriction had been accepted and implemented by her employer. Thus, the question I must answer is whether placing Theda on part time constituted a "transfer" within the meaning of the statute. (It did not constitute a discharge since a discharge is commonly understood to mean termination of all employment with the employer.)

The obvious purpose of the statute is to provide some sort of compensation for claimants who experience a partial wage loss as a result of their occupational diseases. The statute is expressly predicated upon a loss of wages but does not encompass total disability. Placing an employee on part-time status causes a wage loss. Moreover, the job is no longer a full-time position. I therefore conclude that a "transfer" includes a transfer from full-time to part-time employment. Dr. Ramsey's notes, and his prior records and testimony, indicated that the limitation to part-time employment at Big Sky Carvers was more likely than not a permanent one. Theda has therefore satisfied all requirements for an award under section 39-72-405, MCA (1993).

8. The final issue I must decide is the amount of the award. Since the statute references wage loss, it is plainly intended to provide compensation to OD claimants who suffer wage losses. Thus, the amount of the wage loss provides some guidance in making the award. In this case it is the only factor I need to consider. If the wage loss is measured by Theda's reduced work schedule while still working for Big Sky Carvers, then her wage loss equaled \$146.60 weekly (based on a reduction from 40 to 20 hours a week)⁽¹⁾, or approximately \$7,600 annually. If her current wages are compared with what she would be earning for Big Sky Carvers, her wage loss is \$2038.40 annually based on 2,080 hours a year. While section 39-72-405, MCA (1993), does not give me guidance on an applicable period in determining wage loss, I find the period referenced in section 39-71-703, MCA, of 350 weeks at a benefit rate of 66% of wages received at the time of injury, helpful. Applying the 66% to the claimant's wage loss, she would realize the \$10,000 maximum in approximately 383 weeks. I therefore conclude that she is entitled to the maximum, \$10,000 benefit allowed under section 39-72-405, MCA (1993).

JUDGMENT

1. The Court has jurisdiction over petitioner's request.
2. Liberty shall pay petitioner the sum of \$10,000 as compensation due her under section 39-72-405, MCA (1993).
3. Petitioner is entitled to costs in connection with her present petition. She shall file and serve a verified memorandum of costs within 10 days of this judgment. Liberty shall thereafter have 10 days in which to respond to her memorandum. The matter of costs will then be deemed submitted for decision.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 12th day of December, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Theda Bea Bouldin

Mr. Larry W. Jones

Date Submitted: September 10, 1997

1. She was earning \$7.33 an hour. On a 40-hour a week basis, her weekly earnings were \$293.20. Since she was limited to 5 four hour days or 3 six hour days, her work week was halved. Thus, her wage loss was one-half of \$293.20.