

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 48

WCC No. 9702-7703

COLLEEN CONNERY

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

WINTER SPORTS, INCORPORATED

Employer.

DECISION AND JUDGMENT

Summary: Employee injured at ski resort had a 7% impairment rating, entitling her to a permanent total disability award under section 39-71-703, MCA (1995). Insurer refused to pay the award, contending that it was entitled to an offset based on section 39-71-416, MCA (1995), which provides that where a claimant collects damages against a third-party tortfeasor, either by way of judgment or settlement, the workers' compensation insurer may reduce claimant's benefits by up to 30%.

Held: The insurer is not entitled to the offset because section 39-71-416, MCA (1995) is unconstitutional. The statute violates the full redress provision of Article II, section 16 of the Montana Constitution. (Note: affirmed in [Colleen Connery v. Liberty Northwest Insurance Corporation, 1998 MT 125.](#))

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Constitution: Article II, section 16. An insurer is not allowed to reduce benefits under section 39-71-416, MCA (1995) because that statute, which authorizes an insurer to reduce benefits by up to 30% when a claimant recovers against a third-party tortfeasor, violates the full redress provision of Article II, section 16 of the Montana Constitution. (Note: affirmed in [Colleen Connery v. Liberty Northwest Insurance Corporation, 1998 MT 125.](#))

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-416(1), MCA (1995). An insurer is not allowed to reduce benefits under section 39-71-416, MCA (1995) because that statute, which authorizes an insurer to reduce benefits by up to 30% when a claimant recovers against a third-party tortfeasor, violates the full redress provision of Article II, section 16 of the Montana Constitution. (Note: affirmed in [Colleen Connery v. Liberty Northwest Insurance Corporation, 1998 MT 125.](#))

Constitutional Law: Full Redress. An insurer is not allowed to reduce benefits under section 39-71-416, MCA (1995) because that statute, which authorizes an insurer to reduce benefits by up to 30% when a claimant recovers against a third-party tortfeasor, violates the full redress provision of Article II, section 16 of the Montana Constitution. (Note: affirmed in [Colleen Connery v. Liberty Northwest Insurance Corporation, 1998 MT 125.](#))

Introduction

This is the second proceeding involving a dispute arising out of a serious leg injury that claimant, Colleen Connery (Connery), suffered in a skiing accident on December 10, 1995. At the time of the accident, Connery was employed as a ski instructor for Winter Sports, Inc. (Winter Sports) at its Big Mountain ski area in Whitefish, Montana. In the previous case, *Colleen Connery v. Liberty Northwest Ins. Corp.*, WCC No. 9602-7507 (*Connery I*), this Court determined that claimant's injury occurred in the course and scope of her employment as a ski instructor and is therefore compensable. That decision was affirmed upon appeal to the Montana Supreme Court. *Connery v. Liberty Northwest Ins. Corp.*, 929 P.2d 222, 53 St.Rep. 1324 (Mont. 1996).

This present case concerns Connery's entitlement to an impairment award. The parties agree that claimant has a 7% impairment rating as a result of her industrial injury, which entitles her to a permanent partial disability award of \$1,354.12. § 39-71-703, MCA (1995); Pretrial Order, Statement of Uncontested Facts No. 9. However, the respondent/insurer, Liberty Northwest Insurance Corporation (Liberty), claims an offset against that amount and has refused to pay it. The offset is based on section 39-71-416, MCA (1995), which provides that where a claimant collects damages against a third-party tortfeasor, either by way of judgment or settlement, the workers' compensation insurer may reduce the claimant's benefits by up to 30%. Connery settled her third-party claim against the skier who ran into her, and this settlement is the basis of the offset. Through her petition, Connery asserts that the statutory reduction is unconstitutional and that she is entitled to an impairment award. This Court agrees.

Facts

This case was originally scheduled for trial during the week of June 2, 1997, in Kalispell, Montana. However, by letter dated May 21, 1997, claimant's counsel advised the Court that Liberty had withdrawn its subrogation claim and that the only issue remaining to be resolved was Liberty's statutory entitlement to a 30% reduction of benefits. (Order Vacating Trial Date; Order Setting Briefing Schedule, May 23, 1997). Counsel agreed to present that issue to the Court upon the statement of uncontested facts.

Thereafter, the parties filed a Pretrial Order wherein they set out an agreed statement of facts. The agreed facts are as follows:

1. On December 10, 1995, Petitioner was injured in the course and scope of her employment as found by the Montana Supreme Court in Connery v. Liberty Northwest, ___ Mont. ___, ___ P.2d ___, 53 St. Rep. 1324 (Dec. 10, 1996). The claimant was injured when a co-employee, Mark Roy, collided with her on the Big Mountain Ski Hill.
2. At the time of the injury, the employer was enrolled under Compensation Plan No. 2 of the Workers' Compensation Act, and its insurer is Liberty Northwest Insurance Corp.
3. The Petitioner filed a claim against Mark Roy's homeowner's insurance carrier, Farmers Insurance Group, based on his negligence.
4. The elements of damages Petitioner claimed against Farmers Insurance Group resulted from her injury were: past medical expenses of \$3,451.27, future medical expenses of \$500.00, past wage loss of \$2,280.00, pain and suffering of \$25,255.00, and loss of enjoyment of an established course of life of \$25,255.00.
5. On or about February 10, 1997, the claim was settled with Farmers Insurance Group for \$27,500.00, from which attorney fees totaling \$9,166.67 and costs totaling \$244.08 were taken.
6. The Respondent paid to Petitioner wage loss benefits (TTD and TPD) in the amount of \$1,352.34 on February 18, 1997, medical benefits in the amount of \$2,570.95 on or about February 17, 1997, and medical benefits in the amount of \$376.57 thereafter.
- 7. Respondent is not claiming a subrogation interest in the third-party settlement.**
8. By letters dated September 17, 1996, and December 12, 1996, Respondent reserved a 30% reduction of benefits pursuant to § 39-71-416, MCA.

9. The Petitioner has an undisputed impairment rating of 7%. This rating, if awarded by the Court, equals PPD benefits in the amount of \$1,354.12 (7% x 350 weeks = 24.5 weeks x \$55.27 per week).

10. The Respondent has refused to pay the impairment rating claiming the 30% reduction pursuant to § 416 relieves it of that liability.

11. Respondent has also taken the position that Petitioner owes Respondent \$340.08 if the full 30% reduction is taken.

12. The parties agree § 416, if found applicable to this case, results in the following payouts and calculations:

Third party settlement: maximum that Respondent would be entitled to reduce the benefits paid or that are required to be paid, if § 416 is found to be applicable, because of the injury.	\$27,500.00
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Wage loss benefits paid by Respondent =	\$1,352.34
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Medical Benefits paid by Respondent =	<u>2,947.52</u>
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Total of benefits paid by Respondent =	\$4,299.86
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30% reduction is calculated as follows:	<u>x .30</u>
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(Claimed Reduction)	\$1,289.96
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30% reduction against 7% PPD claim calculated as follows:

PPD Claim	\$1,354.12
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(Claimed reduction)	<u>- 30%</u>
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\$ 947.88

Amount Respondent claims Petitioner owes Respondent:	\$1,289.96
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(PPD owed after 30% reduction withheld)	<u>- 947.88</u>
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(Claimed by Respondent from Petitioner)	\$ 340.08
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(Pretrial Order at 1-3, emphasis added.)

Since the parties agreed to present the issue to the Court upon the above statement of uncontested facts and on briefs, the Court deemed this matter submitted for decision with the filing of Petitioner's Reply Brief on July 14, 1997.

Discussion

This decision will be in narrative form since the issue presented is a legal one and the factual background is not in dispute.

Claimant's injury is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). The statute at issue is section 39-71-416, MCA, which was added to the Workers' Compensation Act by the 1995 legislature. This new statute provides:

(1) If an employee is injured or dies and obtains a third-party recovery, settlement, or award, an insurer may reduce by 30% the benefits paid or that are required to be paid to the employee or beneficiary pursuant to chapter 71 or 72 as a result of the injury or death. The reduction applies to any recovery, settlement, or award regardless of the form of action or the nature of damages. The total of any reductions may not exceed 30% of any third-party recovery, settlement, or award.

(2) This section does not limit or prohibit an insurer's right to pursue subrogation pursuant to 39-71-414.

(3) If an insurer is entitled to subrogation pursuant to 39-71-414, the amount subrogated must be offset by any reduction in benefits pursuant to subsection (1).

Connery contends that Liberty is not entitled to the 30% reduction authorized by section 39-71-416, MCA, because the statute unconstitutionally deprives her of her right to full legal redress. Article II, Section 16, 1972 Montana Constitution. In the alternative, she argues that should this Court find section 39-71-416, MCA, constitutional, Liberty waived its right to the 30% reduction because it is liable for her claim. I will consider her arguments in reverse order.

1. Waiver.

Connery's argument concerning waiver is two-fold. First, she argues that section 39-71-416, MCA, is inapplicable since Liberty denied liability for her claim. Second, she contends that Liberty's denial of her claim constituted a common-law waiver of any right it may have had under the section. I am not persuaded by either argument.

Where the terms of a statute are clear, those terms must be applied as written. *Boegli v. Glacier Mountain Cheese Co.*, 238 Mont. 426, 429, 777 P.2d 1303, 1305 (1989). A court cannot insert into a statute terms which the statute omits. *Russette v. Chippewa Cree Hous. Auth.*, 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994). As written, section 39-71-416, MCA, does not make the insurer's acceptance of a claim a prerequisite to its right of offset. The statute broadly provides that where the injured worker obtains any third-party recovery, settlement, or award, the insurer may reduce benefits up to 30%.

Connery's common-law waiver argument is also without merit. "Waiver is a voluntary and intentional relinquishment of a right." *Molerway Freight Lines, Inc. v. Rite-Line Transp. Services, Inc.*, 273 Mont. 95, 102, 902 P.2d 9, 14 (1995). A waiver requires that the party clearly manifest its intention to relinquish a right. *Id.* In this case, there is no evidence that in denying Connery's claim for compensation Liberty intended to waive its right to the 30% offset should it be found liable for the claim.

2. Right to Full Legal Redress.

Connery's constitutional challenge is more substantial and is meritorious. Her challenge is predicated on the right to full legal redress guaranteed by Article II, Section 16, of the Montana Constitution, which provides:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. **No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.** Right and justice shall be administered without sale, denial, or delay. [Emphasis added.]

In *Trankel v. State*, 938 P.2d 614, 622, 54 St.Rep. 380, 386 (Mont. 1997), the Supreme Court stated that in prior decisions it has "without exception, held that it [Article II, Section 16] precludes limitations on claims by injured employees against persons other than the employee's employer or fellow employee." Connery argues that the 30% benefit reduction statute was adopted by the legislature to evade the full redress guarantee.

This Court will not speculate as to the motives of the legislature in adopting the 30% offset. However, I am bound by the Montana Constitution and decisions of the Montana Supreme Court which interpret the Constitution. While recognizing the general rule that the party challenging the constitutionality of a statute must persuade this court **beyond a reasonable doubt** that the statute is indeed unconstitutional, *Vainio v. Brookshire*, 258 Mont. 273, 277, 852 P.2d 596, 599 (1993), after reading Article II, Section 16, and the Supreme Court decisions interpreting it, I am left with a conviction, beyond a reasonable doubt, that the 30% offset authorized by section 39-71-416(1), MCA, is at odds with the constitutional guarantee to full redress. Thus, I am compelled to find the provision unconstitutional.

On its face, section 39-71-416(1), MCA (1995), ignores the worker's right to full legal redress. If the injured worker gets anything, however short of full legal redress, the insurer is entitled to reduce by 30% the benefits otherwise payable to the injured worker. (The reduction is limited to 30% of the recovery if that amount is less than 30% of benefits.) The

net effect of the section is to transfer dollars recovered from the third-party tortfeasor back to the insurer. That transfer is plainly contrary to the full redress provision.

Liberty strenuously argues that the 30% reduction does not affect claimant's third-party recovery and that the section merely deals with claimant's entitlement to benefits. The argument is disingenuous. But for her third-party recovery, Connery would be entitled to full workers' compensation benefits **without** reduction. It is the third-party recovery that triggers the insurer's right to reduce her benefits. The effect of the statute is more pernicious than any subrogation provision since the reduction is automatic and arbitrary.

I therefore conclude that section 39-71-416, MCA (1995), is void and of no effect. Liberty is liable to Connery for the full amount of benefits otherwise due her under the Montana Workers' Compensation Act **without reduction on account of section 39-71-416, MCA (1995)**. The parties have stipulated that claimant has a 7% impairment rating; therefore, the insurer shall pay claimant the full amount of the impairment award in the amount of \$1,354.12 ($7\% \times 350 \text{ weeks} = 24.5 \text{ weeks} \times \$55.27 \text{ per week}$).

3. Attorney Fees and Costs.

Connery also seeks attorney fees and costs. Costs are automatically awarded as a result of her prevailing on the merits. Her request for attorney fees, however, is more troublesome.

Section 39-71-612, MCA (1995), governs the request for attorney fees. An award of attorney fees under that section requires not only that Connery obtain judgment for an amount greater than offered or paid by the insurer but that she also prove that Liberty's actions were unreasonable.⁽¹⁾ She has satisfied the first requirement. It is the second requirement that troubles the Court and on this point Connery has provided the Court with no argument, indeed, her briefs do not address her request for attorney fees at all.

In refusing payment of the impairment award, Liberty relied upon a statute duly enacted by the Legislature of Montana. That statute is presumed constitutional, *State v. Martel*, 273 Mont. 143, 902 P.2d 14, 17 (1995), and Liberty was entitled to rely on that presumption in asserting its rights under the statute. There may well be a point where a statute is so plainly unconstitutional that reasonable insurers should know it is unconstitutional, and in that instance imposition of attorney fees may be appropriate,⁽²⁾ but Connery has not pursued her attorney fee claim in her briefs and the Court deems her failure to do so as a concession that such point was not reached in this case. The request for attorney fees is therefore denied.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Section 39-71-416, MCA (1995), is unconstitutional and void.

3. Respondent is not entitled to a 30% reduction of the benefits otherwise payable to claimant.
4. Claimant is entitled to a 7% impairment award in the amount of \$1,354.12 ($7\% \times 350 \text{ weeks} = 24.5 \text{ weeks} \times \$55.27 \text{ per week}$), which amount shall be paid by respondent to claimant in a lump sum.
5. Claimant is entitled to costs but not to attorney fees.
6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
7. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 4th day of September, 1997.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen

Mr. Larry W. Jones

Date Submitted: July 14, 1997

1. Section 39-71-612, MCA (1995), provides:

Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

2. The Court might, for example, assess the reasonableness of the insurer's position by employing criteria similar to those used in determining whether a governmental official is entitled to qualified immunity. The qualified immunity doctrine employs an objective standard to determine whether the official should have known that his or her conduct violated the constitution. The doctrine was recently discussed in *Boreen v. Christensen*, 930 P.2d 67, 70 (Mont. 1996), wherein the Supreme Court outlined the basic elements for qualified immunity, as follows:

Harlow and its progeny make clear that the qualified immunity inquiry is an objective one. See, e.g., *Davis v. Scherer* (1984), 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139. The qualified immunity inquiry focuses on whether a defendant, faced with circumstances similar to those of the defendant before the court and in light of the legal authorities extant at the time the defendant acted, reasonably should have known that his or her conduct was unlawful. Qualified immunity "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant* (1991), 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589, 596 (quoting *Malley v. Briggs* (1986), 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271, 280).

Harlow presents a two-pronged test to determine whether an official will be granted qualified immunity. The court must first consider whether a clearly established right has been violated and second, the court must determine whether a reasonable person or official would have known that his conduct violated that right. *Sacco v. High Country Indep. Press* (1995), 271 Mont. 209, 216, 896 P.2d 411, 415.

The first prong of the *Harlow* qualified immunity test depends on whether the constitutional right allegedly violated was clearly established at the time of the official conduct giving rise to the litigation. See *Finkelstein v. Bergna* (9th Cir.1991), 924 F.2d 1449; *Burgess v. Pierce County* (9th Cir.1990), 918 F.2d 104.

The plaintiff has the burden of proving that the right which the defendants allegedly violated was clearly established at the time of the alleged misconduct. *Baker v. Racansky* (9th Cir.1989), 887 F.2d 183, 186.