IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 63

WCC No. 2001-0379

DEAN CHAPEL

Petitioner

vs.

MACO WORKERS' COMPENSATION TRUST

Respondent/Insurer for

TROY VOLUNTEER AMBULANCE

Employer.

SUMMARY JUDGMENT

Summary: Petitioner, a volunteer ambulance worker, seeks temporary total disability benefits based on his hours of volunteer work and the state's average weekly wage.

Held: Petitioner is not entitled to temporary total disability benefits. Section 39-71-701, MCA (1995), requires that benefits be based on claimant's wages, and he had none. He is not entitled to benefits for his concurrent employment since that employment was self-employment and he failed to elect workers' compensation coverage with respect to the employment. He is not entitled to benefits based upon imputed wages pursuant to section 39-71-118(7), MCA (1995), since it applies only to firefighters for rural fire districts. Clamant was not a firefighter, nor was he employed by a rural fire district.

Topics:

Benefits: Temporary Total Benefits. Ambulance volunteers who receive no wages are not entitled to temporary total disability benefits.

Benefits: Temporary Total Benefits. Ambulance volunteers are not firefighters and are not entitled to imputation of wages under section 39-71-118(7), MCA (1995), for purposes of calculating temporary total disability benefits.

Benefits: Temporary Total Benefits. Volunteer firefighters not employed by rural fire districts are not entitled to imputation of wages under section 39-71-118(7), MCA (1995), for purposes of calculating temporary total disability benefits.

Benefits: Volunteers. Ambulance volunteers who receive no wages are not entitled temporary total disability benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-118(7), MCA (1995). Ambulance volunteers are not firefighters and are not entitled to imputation of wages under section 39-71-118(7), MCA (1995), for purposes of calculating temporary total disability benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-118(7), MCA (1995). Volunteer firefighters not employed by rural fire districts are not entitled to imputation of wages under section 39-71-118(7), MCA (1995), for purposes of calculating temporary total disability benefits.

Benefits: Temporary Total Benefits. Volunteer ambulance workers are not entitled to temporary total disability benefits based on concurrent self-employment where they have not elected workers' compensation coverage with respect to the self-employment. § 39-71-123(4)(c), MCA (1995).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-123(4)(c), MCA (1995). Volunteer ambulance workers are not entitled to temporary total disability benefits based on concurrent self-employment where they have not elected workers' compensation coverage with respect to the self-employment. § 39-71-123(4)(c), MCA (1995).

Statutes and Statutory Interpretation: Inserting or Removing Terms. Court cannot insert requirement or entitlements not set forth in a statute. § 1-2-101, MCA.

¶1 The parties have entered into a stipulation of facts and agreed to submit their dispute upon Petitioner's Motion for Summary Judgment. The stipulated facts, as set forth by the parties, are as follows:

¶1a Petitioner was a resident of Lincoln County on October 31, 1996.

¶1b Respondent is the insurer for Lincoln County.

¶1c On October 31, 1996, Petitioner was working as a volunteer for the Troy Volunteer Ambulance Service. Petitioner was not paid any salary by the Ambulance Service for his volunteer work. While on call, a gurney collapsed and pulled Petitioner to the ground, and Petitioner suffered various injuries.

¶1d Respondent accepted liability for Petitioner's injury under Respondent's insurance policy with Lincoln County providing workers' compensation insurance to Lincoln County. Respondent has paid various medical benefits for the injuries suffered by Petitioner.

¶1e Petitioner has requested the payment of wage loss benefits based on the hours he volunteered to the ambulance service. Respondent has denied payment for such benefits.

¶1f At the time of the injury, Petitioner was self-employed and did not carry workers' compensation insurance on himself. Petitioner is not claiming benefits for concurrent employment.

¶2 There is one additional fact stated in respondent's brief in opposition to summary judgment. Petitioner has not replied to that statement, although he had an opportunity to do so.[(1)] In light of the agreement of the parties on other facts, the lack of a reply by petitioner, and the obvious intent of the parties to submit the case for decision based on agreed facts, the Court adopts the additional fact. If for any reason it should not have done so, petitioner may request reconsideration. The additional fact is as follows:

¶2A Respondent does not insure rural fire districts.

(Respondent's Response to Petitioner's Motion for Summary Judgement at 2.[(2)])

¶3 The issue presented for decision is whether, despite the fact he received no wages for his volunteer work, the petitioner is entitled to temporary total disability (TTD) benefits.

Discussion and Resolution

¶4 Resolution of the dispute is a matter of the interpretation and application of statutes governing volunteer firemen. Since petitioner was injured on October 31, 1996, the 1995 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶5 Initially, section 39-71-118(1)(g), MCA (1996), governs volunteer ambulance workers. It provides:

> **39-71-118. Employee, worker, volunteer, and volunteer firefighter defined.** (1) The term "employee" or "worker" means:
> (g) a person who is an enrolled member of a volunteer fire department as described in 7-33-4109 **or a person who provides ambulance services** under Title 7, chapter 34, part 1. [Emphasis added.]

Thus, claimant was an employee and entitled to temporary total disability benefits if he had a wage loss. Those benefits are governed by section 39-71-701(3)(c), MCA (1995), which provides:

> (3) Weekly compensation benefits for injury producing temporary total disability are 66 % of the wages received at the time of the injury.

Of course, as a volunteer, petitioner had no wages. Two-thirds of nothing is nothing, hence he is entitled to nothing under the formula.

¶6 Petitioner argues that since he is an employee under the statute, section 39-71-123(4)(b), MCA (1995), does not apply to him. His argument, however, does not advance his cause. Section 39-71-123(4)(b), MCA, concerns concurrent employment, providing:

> (b) The compensation benefits for a covered volunteer must be based on the average actual wages in the volunteer's regular employment, except self-employment as a sole proprietor or partner who elected not to be covered, from which the volunteer is disabled by the injury incurred.

Even if claimant is not considered a "covered volunteer" under the section, he is still not entitled to include wages from self-employment since subsection (c) expressly provides that as to employees self-employment wages may be included in determining benefits only if the claimant has elected coverage with respect to his self-employment venture. Section 39-71-123(4)(c), MCA (1995), provides:

> (c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, **except self-employment as a sole proprietor or partner who elected not to be covered**, from which the employee is disabled by the injury incurred. [Emphasis added.]

Since claimant did not elect coverage for his self-employment, he is not entitled to benefits based on a loss of wages from the employment.

¶7 Petitioner argues that he should receive compensation based upon section 39-71-118(7), MCA (1995), which provides:

> (7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.
> (b) In the event of an election, the employer shall report payroll for all volunteer firefighters for premium and weekly benefit purposes based on the number of volunteer hours of each firefighter times the average weekly wage divided by 40 hours, subject to a maximum of 1½ times the average weekly wage.

He argues that since "[t]here is no separate provisions for ambulance workers . . . it must be concluded that the benefit formula used for firefighters was also intended to apply to ambulance workers." (Petitioner's Motion for Summary Judgment at 3.) If correct, wages

would be imputed to petitioner based upon his volunteer hours and the state's average weekly wage. The argument, however, is unpersuasive.

¶8 In construing statutes the Court is precluded from inserting requirements or entitlements which the legislature has omitted. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. No mention is made in the cited section of ambulance workers, and the Court cannot expand the coverage of the section to include ambulance workers. Moreover, subsection (7) applies only to Rural Fire Districts. Petitioner was not employed by a Rural Fire District as a fireman, ambulance driver, or otherwise, thus the section is inapplicable.

¶9 Having failed to cite any legal authority which might entitle him to TTD benefits, summary judgment must be granted to respondent, not petitioner.[(3)]

JUDGMENT

¶10 The petition in this matter is **dismissed with prejudice**. Each party is responsible for his/its costs and attorney fees.

¶11 This Summary Judgment is certified as final for purposes of appeal.

DATED in Helena, Montana, this 14th day of December, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Laurie Wallace
Mr. Norman H. Grosfield
Submitted: December 11, 2001

1. Petitioner had an opportunity to file a response brief but notified the Court that he would not do so. He could have controverted the additional factual statement in such brief.

2. Respondent offered to confirm this fact by affidavit if petitioner wished. (*Id*.) Petitioner did not respond to the offer, thus further indicating that the fact may be accepted as true for purposes of the summary judgment motion.

3. A formal cross-motion is not required for the court to grant summary judgment to the non-moving party, as long as "the original movant had a full and fair opportunity to meet the proposition" and the other party is entitled to judgment as a matter of law. *Hereford v. Hereford*, 183 Mont. 104, 107-08, 598 P.2d 600, 602 (1979).