

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 44

WCC No. 2003-0729

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ROBERT CHEETHAM, JR., individually  
and on behalf of others similarly situated

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

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DECISION AND JUDGMENT

**Summary:** Dispute over whether the cost-of-living adjustment provided in section 39-71-702(4), MCA (1995), is to be based on a permanently totally disabled claimant's benefits after deducting any social security offset or before applying any offset.

**Held:** The cost-of-living adjustment provided in section 39-71-702(4), MCA (1995), must be computed based on the claimant's benefit rate **before** the social security offset.

**Topics:**

**Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-702(5), MCA (1995).** The cost-of-living adjustment provided in section 39-71-702(5), MCA (1995), must be based on the benefits rate provided in section 39-71-702(3), MCA (1995), before any social security offset provided in section 39-71-702(4), MCA.

**Benefits: Permanent Total Benefits: Cost-of-Living Adjustment.** The cost-of-living adjustment provided in section 39-71-702(5), MCA (1995), must be based on the benefits rate provided in section 39-71-702(3), MCA (1995), before any social security offset provided in section 39-71-702(4), MCA.

**Class Actions.** Where insurer is using improper formula for calculating benefits, insurer generally has a duty to recalculate the benefits of other similarly situated claimants and pay any additional benefits due. *Murer v. State Compensation Ins. Fund*, 283 Mont. 210, 223, 942 P.2d 69, 76-77 (1997).

**Class Actions.** Without determining specific entitlements of other claimants, or passing on any possible defenses of the insurer, the Court will retain jurisdiction to enforce

entitlements of other claimants which result from a decision of this Court or the Supreme Court finding that the insurer has been using an improper formula when computing benefits.

¶1 The sole issue in this case is whether the cost-of-living increase provided in section 39-71-702(5), MCA (1995), is computed before or after application of the social security offset. The agreed facts are as follows:

¶1a Petitioner sustained an industrial injury on August 7, 1996, while in the course and scope of his employment with Hawkeye Construction. Petitioner sustained a dissecting aortic aneurysm, which resulted from overexertion while trying to start a portable water pump.

¶1b At the time of the injury, Petitioner's employer was enrolled under Compensation Plan No. 2 of the Workers' Compensation Act, and its insurer is Liberty Northwest Insurance Corporation. The Respondent accepted liability for Petitioner's injury and has paid compensation benefits. The parties agree that Petitioner is permanently and totally disabled.

¶1c At the time of the injury, Petitioner's temporary total disability benefit rate was \$384.00 per week.

¶1d Petitioner began receiving social security disability benefits February 1, 1997, at a rate of \$952.00 per month, which resulted in a temporary total disability offset of \$109.55 per week, for an offset rate of \$274.45 per week.

¶1e On or about July 3, 1997, Respondent paid to Petitioner past-due temporary total disability benefits in the amount of \$5,068.80, which represented benefits for the period 10/31/96 through 1/31/97 at the rate of \$384.00, plus \$6,037.90, which represented benefits for period 2/1/97 through 7/4/97 at the offset rate of \$274.45 per week.

¶1f Respondent has calculated Petitioner's COLA increases beginning July 1, 1999, and subsequent increases, based on the offset rate of \$274.45 per week, rather than on Petitioner's original rate before the social security offset.

(Statement of Agreed Facts 1-2.)

¶2 Petitioner disputes Liberty Northwest Insurance Corporation's (Liberty) calculations of his COLA increases, urging that COLAs must be computed on his original benefit rate unreduced by any social security offset. I agree.

¶3 The issue is one of statutory interpretation involving an interplay among subsections (3), (4) and (5) of 39-71-702, MCA (1995). Those subsections provide as follows:

(3) Weekly compensation benefits for an injury resulting in permanent total disability are  $66\frac{2}{3}\%$  of the wages received at the time of the injury. The maximum weekly

compensation benefits may not exceed the state's average weekly wage at the time of injury.

(4) In cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.

(5) A worker's benefit amount must be adjusted for a cost-of-living increase on the next July 1 after 104 weeks of permanent total disability benefits have been paid and on each succeeding July 1. A worker may not receive more than 10 adjustments. The adjustment must be the percentage increase, if any, in the state's average weekly wage as adopted by the department over the state's average weekly wage adopted for the previous year or 3%, whichever is less.

¶4 As an initial matter, the Court must determine whether these provisions are ambiguous. If they are not ambiguous, then the Court's job is at an end: "When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation." *In re Marriage of Christian*, 1999 MT 189, 12, 295 Mont. 352, 983 P.2d 966.

¶5 I find no ambiguity in the quoted sections. Subsection (3) establishes the amount of a claimant's weekly benefits. Subsection (5) provides for a cost-of-living adjustment to those weekly benefits. Subsection (4) simply provides for a reduction of the weekly amount *to which the claimant is otherwise entitled*. The subsection says that "**the weekly benefits payable under this section**" are to be reduced by one-half of the amount of social security benefits. The "weekly benefits payable" under section 39-71-702, MCA, are the benefits fixed in subsection (3), increased by the COLAs required by subsection (5). Liberty has improperly calculated the claimant's benefits by applying the COLAs after reducing the base benefit provided in subsection (3) by the social security offset. Claimant is therefore entitled to a recalculation of his benefits for periods since July 1, 1999, using the correct formula.

¶6 Petitioner has also requested class certification for permanently totally disabled claimants whose COLAs have similarly been miscalculated. Pursuant to *Murer v. State Compensation Ins. Fund*, 283 Mont. 210, 942 P.2d 69 (1997), the present decision establishes "a vested right on behalf of the absent claimants to directly receive immediate monetary payments of past due benefits underpayments; and based on the establishment of those vested rights" Liberty becomes "legally obligated to make the increased benefits payments" to those absent claimants. 283 Mont. at 223, 942 P.2d at 76-77. However, in accordance with recent decisions of this Court, e.g., *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38 and *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6,

enforcement of those rights will be handled in a more informal manner than a class action. No determination is made concerning particular entitlements or possible defenses with respect to other claimants. The Court will consider formal class certification and proceedings only if more informal proceedings prove unworkable. Class certification is therefore **denied without prejudice**.

#### JUDGMENT

¶7 The cost-of-living adjustment (COLA) provided in section 39-71-702(5), MCA (1995), must be applied to the benefit amount provided in section 39-71-702(3), MCA (1995). Any social security offset permitted under section 39-71-702(4), MCA (1995), applies only after the COLA is applied. Liberty shall recalculate the petitioner's permanent total disability benefits since July 1, 1999, and pay him any additional amount owed as a result of the recalculation. The Court retains jurisdiction to resolve a dispute regarding the actual amount in cases the parties cannot agree.

¶8 The request for class certification is **denied without prejudice**. However, the Court retains jurisdiction to enforce rights of other Liberty Northwest Insurance Corporation claimants entitled to benefits as a result of this decision and to determine any common fund fees which may be due the petitioner's attorneys.

¶9 Petitioner is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶10 This JUDGMENT is certified as final for purposes of appeal.

¶11 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 17<sup>th</sup> day of June, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Larry W. Jones

Mr. Thomas J. Harrington (courtesy copy)

Mr. William O. Bronson (courtesy copy)

Submitted: May 6, 2003