

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 39

WCC No. 9512-7453

JOSEPH EVANS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

ROSCOE STEEL & CULVERT COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 47-year old permanently, totally disabled claimant, injured in 1980, entered into agreement with State Compensation Insurance Fund to receive lump sum advance to purchase home. He agreed in writing that State Fund would recoup the advance by reduction in his benefits through his reaching age 65. He now asks for a lump sum conversion of all remaining benefits to pay existing debts or an order that the recouping of benefits occur through age 79, his claimed life expectancy.

Held: In this old law case, guidance on lump sum conversion comes from *Sullivan v. Aetna Life & Casualty*, 271 Mont. 12, 894 P.2d 278 (1995), wherein the Supreme Court reiterated that biweekly benefits are the general rule, but a lump sum conversion may be done when in the claimant's best interests. A lump sum advance for payment of debts may be in a claimant's best interests but the mere fact that the claimant has indebtedness is not sufficient grounds. Here, the Court was not satisfied a lump sum advance was in claimant's interest where his explanations regarding his indebtedness were not satisfactory and claimant appears simply unable or unwilling to manage his money. Claimant did not provide the Court with a credible accounting of income and expenses, nor a reasonable plan for the future. Where claimant specifically agreed that the prior advance would be recouped before he reached age 65, and claimant's life expectancy may be lower than the age 79 he claims, the Court will not order State Fund to delay or decrease recoupment of the prior advance. Note: this decision was affirmed by the Montana Supreme Court in

Evans v. State Compensation Ins. Fund, No. 96-329 (1996), an unpublished, non-citeable opinion.

Topics:

Benefits: Lump Sums: Generally. In this old law case, guidance on lump sum conversion comes from Sullivan v. Aetna Life & Casualty, 271 Mont. 12, 894 P.2d 278 (1995), wherein the Supreme Court reiterated that biweekly benefits are the general rule, but a lump sum conversion may be done when in the claimant's best interests. A lump sum advance for payment of debts may be in a claimant's best interests but the mere fact that the claimant has indebtedness is not sufficient grounds. Here, claimant's explanations regarding his indebtedness were not satisfactory and he appears simply unable or unwilling to manage his money. Claimant did not provide the Court with a credible accounting of income and expenses, nor a reasonable plan for the future. Note: this decision was affirmed by the Montana Supreme Court in Evans v. State Compensation Ins. Fund, No. 96-329 (1996), an unpublished, non-citeable opinion.

Benefits: Lump Sums: Best Interests. In this old law case, guidance on lump sum conversion comes from Sullivan v. Aetna Life & Casualty, 271 Mont. 12, 894 P.2d 278 (1995), wherein the Supreme Court reiterated that biweekly benefits are the general rule, but a lump sum conversion may be done when in the claimant's best interests. A lump sum advance for payment of debts may be in a claimant's best interests but the mere fact that the claimant has indebtedness is not sufficient grounds. Here, claimant's explanations regarding his indebtedness were not satisfactory and he appears simply unable or unwilling to manage his money. Claimant did not provide the Court with a credible accounting of income and expenses, nor a reasonable plan for the future. Note: this decision was affirmed by the Montana Supreme Court in Evans v. State Compensation Ins. Fund, No. 96-329 (1996), an unpublished, non-citeable opinion.

Trial in this matter was held on May 8, 1996, in Billings, Montana. Petitioner, Joseph Evans (claimant), was present and was represented by Mr. Brad L. Arndorfer. Respondent, State Compensation Insurance Fund, was represented by Ms. Ann E. Clark. Exhibits 1 through 18 were admitted without objection. Exhibit 19 was admitted over the objection of Ms. Clark. The claimant and Samantha Heigh were sworn and testified

Issues presented: Claimant seeks a lump sum conversion of his remaining entitlement to permanent total disability benefits. If his request is denied, he seeks an order directing the State Fund to recoup a prior lump sum advance from the distal end of his benefits.

Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 47 years old. He has a GED.
2. On June 25, 1980, claimant suffered an industrial injury to his right shoulder while working as a laborer for Roscoe Steel in Billings, Montana. (Ex. 1.)
3. The State Fund insured Roscoe Steel and accepted liability for claimant's industrial injury. It has paid both medical and wage loss benefits. (Ex. 16.)
4. Since his injury the claimant has had continued difficulty with his shoulder. In September 1993, the State Fund determined he was permanently totally disabled and converted his benefits to permanent total status.
5. On February 17, 1993, claimant, through his attorney, requested a lump sum conversion of his remaining permanent total disability benefits. He specifically requested a lump sum advance of \$85,342.42, of which \$65,342.42 was intended for attorney fees and the remaining \$20,000.00 for a house purchase, and another \$100,000.00 for the purchase of an annuity which would pay him \$176,027.26 over his lifetime. (Ex. 17 at 7.) The request for an advance for money to buy a house was based on his assertion that he was then living in a Billings neighborhood which was riddled by crime and inhabited by drug dealers. (*Id.*) According to his attorney's letter, he had been involved in a shoot out with putative drug dealers. (*Id.*) By implication, his life was in danger.
6. Thereafter, there was an exchange of letters between the State Fund and claimant's attorney, culminating in an October 20, 1993 letter from the State Fund finally rejecting any lump sum conversion of future benefits. (Ex. 15 at 31.) However, the letter, written by claims examiner Samantha Heigh, indicated that the State Fund would be willing to "offer a lump sum if Mr. Evans can show the need for financial assistance. **That lump sum would then be recovered on a biweekly basis until Mr. Evans reaches age 65.**" (*Id.*; emphasis added.)
7. Claimant's counsel wrote the State Fund on August 11, 1994, proposing a lump sum advance of \$68,750. The letter reiterated claimant's need to move from his current neighborhood and went on to say, in relevant part:

Mr. Evans has found a home in Bridger, Montana of the modest price of \$55,000. It is imperative that he move and it is certainly in his best interests.

I would ask for an advance of the \$55,000 plus \$13,750 attorney fees (25% of 55,000). We were unable to settle this previously and I do not care to if Mr. Evans can get this money for the home.

The seller is not willing to hold the property for long and is insisting that she needs a decision by Tuesday, August 16, 1994 or she will list the property.

Could you please run this by whomever and call me as soon as possible?

(Ex. 17 at 18.)

8. On September 8, 1994, the State Fund received a Petition for Lump Sum Advance of Permanent Total Disability Benefits signed by claimant and his attorney. The petition provided in relevant part:

I therefore petition the Department of Labor and Industry for a lump sum advance on any compensation in the amount of SIXTY-EIGHT THOUSAND AND SEVEN HUNDRED FIFTY AND NO/100TH DOLLARS (\$68,750.00).

I understand the insurer may recoup this lump sum advance from any type of biweekly benefits or any type of award or settlement I receive in the future.

I UNDERSTAND:

The above amount will be recovered by age SIXTY FIVE (65).

(Ex. 18 at 2; emphasis added.) The State Fund concurred in the petition and submitted it to the Department of Labor and Industry for approval.

9. The Employment Relations Division of the Department of Labor and Industry approved the petition and issued an order stating, in relevant part:

The Department of Labor & Industry Employment Relations Division is in receipt of a petition requesting a lump sum advance of permanent total disability benefits in the amount of SIXTY-EIGHT THOUSAND AND SEVEN HUNDRED FIFTY AND NO/100 DOLLARS (\$68,750.00) concerning [claimant's] workers' compensation claim. **The above amount will be recovered by age SIXTY-FIVE (65).**

(Ex. 18 at 4; emphasis added.)

10. Sixty-eight thousand seven hundred fifty dollars (\$68,750) was then advanced to claimant, who then purchased the house in Bridger, Montana. Additional information concerning that purchase is important to the resolution of this case and is set forth in findings which follow.

11. After the advance the State Fund reduced claimant's biweekly benefits by \$134.66, an amount calculated to recoup the advance by the time claimant reaches age 65. (Ex. 15 at

33.) Claimant's biweekly rate was \$324.28 prior to the advance, or \$704.50 monthly (based on a 52.14 week year). (*Id.*) After the reduction, claimant receives \$189.62 biweekly, or \$411.95 monthly.

12. With his lump sum advance the claimant purchased a house in Bridger, Montana. He testified at trial that the original buy/sell agreement specified a purchase price of \$55,000 for the house, the lot upon which it was located, and a second, vacant lot. According to claimant, he discovered several defects in the house after he executed the agreement and renegotiated the purchase price downward to \$35,000. Under the renegotiated agreement, however, the vacant lot was excluded. Neither the original agreement nor the renegotiated one was provided to the Court.

13. Following the reduction of claimant's benefits, claimant's counsel wrote the State Fund on August 15, 1995, protesting its recoupment of the advance from claimant's biweekly benefits:

Joe originally had a buy sell agreement on the house in Bridger, Montana for \$55,000. After agreeing to purchase that house, along with two lots (including the one the house stands on) Joe discovered that the home's foundation was damaged. He then renegotiated a new agreement in which he paid \$35,000.00 for the house and the single lot on which it stands. The remainder of the lump sum settlement was to be used to complete the necessary repairs to the home. Soon after Joe entered into this agreement with the seller, Work Comp reduced his payments from \$648.56 per month to \$379.24 per month

The remainder of the lump sum payment was necessarily used to survive from month to month. Mr. Evans has provided me with receipts on his monthly expenses from 10/94 to-date. They average out to a total of \$1,764.68 per month, with an additional \$2,945.38 in receipts for material to begin repairs on the home. These figures do not include any amounts spent to hire help in performing the repairs.

It was my understanding at the time of Work Comps advance that Mr. Evans monies would be taken from the backside of the contract as had been discussed. In reading the paperwork, I believed that still was the way it was intended to work. I felt that by the time Mr. Evans reached age 65 he would have some social security and this was in his best interests. The current amount of payment makes him unable to survive.

(Ex. 17 at 22.) The letter went on to state that claimant wished to settle the entire case in order to purchase an annuity to provide future income for claimant.

14. The State Fund rejected the proposed settlement. Claimant thereafter filed the present action.

15. Claimant, through his present petition, seeks a lump sum conversion of the entire amount of benefits which may become due him during his lifetime. Based on life expectancy tables he estimates he will live to be seventy-nine and one-half years (79.5). Based on that estimate, at the commencement of trial he requested \$240,859.17. Of that amount he sought \$26,187.26 to pay his outstanding debts; another \$30,000.00 to pay for additional repairs to his house in Bridger; and the remaining \$184,471.91 to purchase an annuity which he claims will pay him \$1,295.00 a month until he reaches age 65. Claimant did not provide any annuity quotation.

16. In the midst of trial, claimant's counsel acknowledged that claimant's request failed to consider the amount of the August 1994 advance and suggested that the advance be offset against the request.

17. Claimant testified at trial that he bought the house in Bridger because of his allergies and the unwholesome Billings' neighborhood in which he had been living. He further testified that while living in Billings, drug dealers had threatened him and his girlfriend because of a number of drug busts that had occurred. While he did not elaborate, if his testimony is to be believed it is a fair inference that the alleged dealers held him accountable for those busts.

18. Claimant described an incident in which unknown assailants shot at his house from a car, shattering his front window. Claimant testified that he returned fire, emptying his own revolver into the fleeing car. No further information concerning the incident was provided.

19. Claimant reported that he has been stalked by drug dealers. He also believes that he is being followed by investigators from the State Fund. The State Fund did in fact pursue an investigation into his activities and to verify his address, but those efforts were discontinued prior to March 15, 1995. (Ex. 15 at 33.) Nonetheless, claimant testified that he has continued to be followed, even up to three or four days prior to trial. However, he could provide no factual basis for his belief that he was being tailed by State Fund investigators and conceded that the villains might be drug dealers.

20. Claimant's request for a lump sum conversion is based in part on his indebtedness. His current debts, **all incurred since he received the August 1994 advance**, are as follows:

1. Capital One	\$3,878.89
2. Bank Americard	\$4,161.55
3. GE Classic	\$3,903.85
4. First Card	\$2,593.54
5. Norwest Bank	\$2,837.96

6. Sears Card	\$192.57
7. Valley [Bank]	\$7,392.06
8. Chemical [Bank]	\$1,226.84
TOTAL	\$26,187.26

(Ex. 19.) He testified that he incurred \$7,000 to \$8,000 of this indebtedness on account of his regular living expenses and incurred the remaining \$18,000 to \$19,000 for repairs to his house in Bridger. He provided no documentation or other verification concerning his run-up of the accounts.

21. Claimant testified that the house he purchased in Bridger had defects in its foundation, windows, wiring, and roof.

22. Due to the reduction in the price of the house from \$55,000 to \$35,000, claimant had \$20,000 available to him to effect repairs. However, he could not accurately account for his expenditure of the \$20,000. In testifying at trial, he initially estimated that \$10,000 was expended on repairs to the house and the other \$10,000 on living expenses. But he later testified that \$5,000 was used to pay off existing debts, another \$5,000 for living expenses, and \$10,000 for house repairs. Of his credit card run-up, he testified that \$7,000 to \$8,000 was expended for living expenses and the remainder for house repairs. In answer to questions from the Court, he confirmed that over the approximately 18-month period following his receipt of the lump sum advance he spent approximately \$13,000 on personal, living expenses. This amount is in addition to his expenditure of his biweekly benefits.

23. According to claimant's testimony, since the purchase of his Bridger house he has expended approximately \$28,000 to \$29,000 for repairs to his Bridger house. He testified that much of this amount was expended on repairs to the foundation of his house. He has provided no documentation of his expenditures.

24. Claimant testified that his house is still in bad shape. He testified that he has received a \$30,000 estimate for additional repairs which are needed. He did not furnish the Court with the estimate or any other supporting documentation.

25. Claimant testified that he is behind on his credit card payments. However, a recent credit report obtained by the State Fund shows that he is current in all of his credit card payments.

26. Observing and listening to claimant, and considering his failure to provide any documentation whatsoever for his request, the Court did *not* find credible the claimant's testimony concerning his expenditures and the need for additional repairs to his house. His testimony and statements were also conflicting, further undermining his credibility.

a. In a letter written by his attorney on February 17, 1993, and presumably based on information he supplied, claimant represented that he "currently owns a small house [in Billings] that is being surrounded by drugs and crime." In testimony at trial, however, he denied owning the Billings house and said it was owned by his girlfriend.

b. Claimant gave contradictory testimony concerning his discovery of a problem with the foundation on his Bridger house. Initially, he testified that prior to renegotiating the purchase price for the house he was removing carpet from the basement and discovered that the "basement was totally gone" and would have to be "taken out," and that after the discovery he negotiated the purchase price down to \$35,000. Minutes later he testified that he discovered the foundation of the house was bad four months after his purchase of the house. In response to questions from the Court, he then testified that he had negotiated the discounted purchase price because the "top" of the house needed remodeling, specifically rewiring, new carpeting and replacement windows.

c. Claimant's reported expenditures for living expenses during the 18 months following his lump sum advance significantly exceeded his pre-advance benefits. His pre-advance benefits were \$704.50 per month. Taking into account his use of the advance, his credit card charges, and his reduced biweekly benefits, claimant's post-advance income available for monthly living expenses was \$1,133.95, or \$429.45 more a month than his pre-advance benefits. His testimony concerning his expenditures is either untrue or indicates an inability to adjust his expenses to his income.

d. Claimant's testimony that there were **30** layers of carpet in the basement of his Bridger house is implausible and struck the Court as a gross exaggeration.

27. The Court is not satisfied that claimant has a life expectancy of 79.5 years. According to claimant's own testimony, drug dealers have targeted him and have carried out one drive-by shooting. Claimant responded in kind, emptying his own revolver into the car perpetrating the drive-by shooting. Claimant's description of the drive-by shooting brings on images of inner-city drug-related violence. He did not explain his involvement in the drug scene but his testimony shows that he is somehow involved, perhaps as an informer. If he is a target of drug dealers, as he claims, I am not satisfied that his move from Billings to Bridger provides sufficient distance to assure his longevity. His testimony, if true, concerning his being followed just prior to trial suggests that he is still in danger.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Claimant's

injury was in 1980, thus the 1979 version of the Workers' Compensation Act governs this case.

2. The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

3. This is an old law case. The most recent Supreme Court decision concerning old law lump sums is *Sullivan v. Aetna Life & Casualty*, 271 Mont. 12, 894 P.2d 278 (1995). In that case the Court engaged in a lengthy discussion of its prior precedents. It reiterated the general rule that biweekly benefits are the rule, lump sums the exception, but also adhered to prior decisions holding that future benefits should be converted to a lump sum when in the claimant's best interest. A lump sum advance for the payment of debts *may* be in a claimant's best interest but, as *Sullivan* expressly holds, "[T]he mere fact that the claimant has outstanding indebtedness is not sufficient grounds for lump sum settlement." *Id.* at 17, 894 P.2d at 281.

In this case, I am not satisfied that a lump sum advance to pay indebtedness is in the claimant's best interest. His explanation of his expenditures is undocumented, wholly unsatisfactory, and not credible. If he is to be believed, he has expended almost as much (\$28,000 to \$29,000) on his house in Bridger as its entire purchase price (\$35,000), and still needs \$30,000 to finish repairs. If he is believed, necessary repairs will cost almost twice as much as the original cost of the house.

According to claimant, his run-up of his credit card balances included money for his living expenses. Adding that money to his biweekly benefits and the \$5,000 he says he used from the 1994 lump sum advance to pay for living expenses, the money he has had available for monthly living expenses over the last 18 months has been far in excess of his monthly income prior to the 1994 advance, thus indicating an inability to manage his money. His undocumented, perfunctory, and superficial presentation concerning his expenditures over the last 18 months and the need for additional house repairs, also raises serious questions about his ability to manage money.

Moreover, if the Court approves an advance to pay off indebtedness, claimant's benefits will be further reduced. I am unpersuaded that claimant's life expectancy is 79.5 years. If his accounts of involvement with drug dealers is true, his life expectancy may be far less. Under the circumstances I would allow the State Fund to recoup any advance by age 65.

There is also no basis for awarding claimant a lump sum to purchase an annuity. Claimant's assertion that he will be better off with an annuity is identical to the argument made and rejected in *LaVe v. School Dist. No. 2*, 220 Mont. 52, 55, 713 P.2d 546, 547-48 (Mont. 1986).

In the instant case, appellant advances two principal reasons for requesting a lump sum payment. They are: (1) appellant and her husband have outstanding debts, and (2) **appellant and her husband wish to invest the money and receive a return which would be greater than the weekly benefits.** Neither appellant nor her husband have proposed a concrete, specific plan of investment. Neither of the two have personally contacted an investment or financial counselor. An investment counselor did testify for appellant on the return that appellant could expect if she was granted, and invested, a lump sum award. In *Kent v. Sievert* (1971), 158 Mont. 79, 81, 489 P.2d 104, 105, this Court held that where a claimant requested a lump sum payment proposing "to put it 'on interest,'" that proposed use was insufficient to warrant a lump sum payment. Kent is still the law and **appellant's desired investment is not reason, by itself, to award her a lump sum payment. Otherwise, any claimant desiring a lump sum award could secure one by proposing to invest it. This would defeat the statutory intent of Montana's Workers' Compensation scheme, as lump sum awards are to be the exception.** Section 39-71-741, MCA. [Emphasis added.]

4. The claimant urges the Court to at least order the State Fund to recoup its 1994 advance from the distal end of claimant's benefits, *after* claimant reaches age 65. The language of the 1994 agreement, however, is clear and unambiguous; as such, it must be followed. *Molerway Freight Lines, Inc. v. Rite-Line Transp. Services, Inc.*, 902 P.2d 9, 12 (1995). The agreement expressly provides that the State Fund shall recoup the advance from claimant's biweekly benefits and that recoupment shall be completed by the time claimant reaches age 65. The Court will not rewrite the agreement:

The rule has long been that where no ambiguity exists in the written documents, no parol evidence may be taken, (*citation omitted*) and the duty of the court is simply to apply the language as written.

Montana Bank of Circle v. Meyers and Son, 236 Mont. 236, 243, 769 P.2d 1208, 1212 (1989).

JUDGMENT

1. Claimant's request for a lump sum conversion of his future entitlement to workers' compensation benefits is **denied**.
2. Claimant's request that the State Fund be ordered to recoup a 1994 lump sum advance from benefits payable after claimant reaches age 65 is **denied**.
3. Claimant is not entitled to attorney fees or costs.
4. The petition is **dismissed**.
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.

6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

Dated in Helena, Montana, this 30thday of May, 1996.

(SEAL)

/s/ Micke McCarter

JUDGE

c: Mr. Brad L. Arndorfer

Ms. Ann E. Clark

Submitted: May 8, 1996