

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 48

WCC No. 9907-8274R1

WCC No. 2000-0023R1

WCC No. 2000-0030R1

ALEXIS RAUSCH

CHARLES FISCH

THOMAS FROST

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION AND JUDGMENT RESPECTING REMAINING ISSUES

AFFIRMED 06/07/05

Summary: In furtherance of a global claim for common fund attorney fees from all claimants benefitted by the prior Supreme Court decision in this case, claimants' attorneys request the Court to issue a subpoena compelling the Department of Labor and Industry to provide information identifying the benefitted claimants. Both parties also seek a declaratory judgment as to whether permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are entitled to impairment awards.

Held: (1) Claimants' attorneys are not entitled to global attorney fees with respect to all benefitted claimants, only with respect to claimants of the respondent Montana State Fund. (2) Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards.

Topics:

Attorney Fees: Common Fund. Attorneys who establish a precedent are not entitled to common fund fees from all claimants, only from claimants of the respondent insurer. [Ruhd v. Liberty Northwest Ins. Corp., 2003 MTWCC 38](#). Therefore, they are not

entitled to subpoena information from the Department of Labor and Industry which identifies all benefitted claimants.

Benefits: Impairment Awards. Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards. The 1987 and 1989 statutes differ from those construed in [Rausch, Fisch, Frost v. State Compensation Ins. Fund, 2002 MT 203, 311 Mont. 210, 54 P.3rd 25](#). The 1987 and 1989 statutes expressly provide for repayment of any impairment award should a worker become permanently totally disabled. § 39-71-703(1)(a)(iv), MCA (1987-89).

Benefits: Permanent Total Benefits. Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards. The 1987 and 1989 statutes differ from those construed in [Rausch, Fisch, Frost v. State Compensation Ins. Fund, 2002 MT 203, 311 Mont. 210, 54 P.3rd 25](#). The 1987 and 1989 statutes expressly provide for repayment of any impairment award should a worker become permanently totally disabled. § 39-71-703(1)(a)(iv), MCA (1987-89).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703(1)(a)(iv), MCA (1987-89). Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards. The 1987 and 1989 statutes differ from those construed in [Rausch, Fisch, Frost v. State Compensation Ins. Fund, 2002 MT 203, 311 Mont. 210, 54 P.3rd 25](#). The 1987 and 1989 statutes expressly provide for repayment of any impairment award should a worker become permanently totally disabled. § 39-71-703(1)(a)(iv), MCA (1987-89).

Cases Discussed: Rausch, Fisch, Frost v. State Compensation Ins. Fund, 2003 MT 203, 311 Mont. 210, 54 P.3rd 25. Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991 are not entitled to impairment awards. The 1987 and 1989 statutes differ from those construed in [Rausch, Fisch, Frost v. State Compensation Ins. Fund, 2002 MT 203, 311 Mont. 210, 54 P.3rd 25](#). The 1987 and 1989 statutes expressly provide for repayment of any impairment award should a worker become permanently totally disabled. § 39-71-703(1)(a)(iv), MCA (1987-89).

¶1 The Court has recently issued a final decision and judgment concerning the amount of common fund attorney fees due claimants' attorneys with respect to impairment awards owed by the Montana State Fund to permanently totally disabled (PTD) claimants who were injured after June 30, 1991. The sole remaining issues in this case concern (1) the outstanding request by claimants' attorneys that the Court issue a subpoena compelling the Department of Labor and Industry (Department) to furnish information identifying PTD claimants entitled to impairment awards from other insurers and (2) whether PTD claimants injured between July 1, 1987 and June 30, 1991, are entitled to impairment awards.

I. Subpoena Request

¶2 As a result of the Supreme Court decision in this case,⁽¹⁾ the claimants' attorneys are claiming a lien for common fund attorney fees with respect to all PTD claimants injured since July 1, 1991, who are owed impairment awards. The lien claim extends to not only those claimants insured by the Montana State Fund but to all claimants irrespective of

the insurer. I characterize the claim as a "global" one to indicate the comprehensive nature of the claim.

¶3 The request for a subpoena was made by letter dated May 20, 2003, and is the first step to enforcing the global lien claimed by claimants' attorneys. Shortly after the request was made, this Court issued a decision and order in *Ruhd v. Liberty Northwestern Ins. Corp.*, 2003 MTWCC 38, holding that common fund attorney fees are limited to claimants of the respondent insurer. In that decision I specifically rejected the global claim for common fund attorney fees. In light of that decision, the attorneys for claimants in this case are not entitled to subpoena information regarding claimants of other insurers. Their request must therefore be denied.

¶4 However, in light of an appeal of my decision in *Ruhd*, and the likelihood of an appeal of my denial of the request for a subpoena in this case, I am authorizing all Plan I and II insurers and self-insureds to continue withholding 25% of all impairment awards paid to PTD claimants injured after June 30, 1991. The continued withholding will preserve the lien claim pending a final decision by the Supreme Court.

II. 1987-1991 Impairment Awards

¶5 The parties have agreed to submit the issue of impairment awards for PTD claimants injured between July 1, 1987 and June 30, 1991, for declaratory judgment. The petition is therefore deemed amended to request declaratory judgment in that regard. Since the Montana State Fund acknowledges that it is not paying impairment awards to PTD claimants under age 65 who were injured between July 1, 1987 and June 30, 1991, a real controversy is presented. While none of the claimants in this case were injured during that time frame, their interests are identical to the interests of PTD claimants injured during the earlier period. Moreover, the issue presented is the same; only the statutes are somewhat different. The question is whether they are sufficiently different for the Court to reach a different conclusion with respect to the 1987-1991 law than reached by the Supreme Court in the original appeal in this case.

¶6 The determination made in the original appeal in this case was the result of the Supreme Court's reading different sections of the Workers' Compensation Act and harmonizing them. See *Rausch, Fisch, Frost v. State Compensation Ins. Fund*, 2002 MT 203, ¶ 19, 311 Mont. 210, 54 P.3d 25 (hereinafter "*Rausch*"). The Supreme Court acknowledged that "[n]o section of the Workers' Compensation Act explicitly authorizes impairment awards per se" but found them implicitly authorized in sections 39-71-710 and 39-71-737, MCA. *Id.* at ¶¶ 20-23.

¶7 As in *Rausch*, this Court must engage in a similar review of all sections pertaining to impairment awards, reading them together and harmonizing them if possible.

¶8 Initially, sections 39-71-710 (1987-89) and 39-71-737, MCA (1987-89), are identical to the 1991 versions of those sections. As noted earlier, in *Rausch* the Court held that the 1991 version of the sections implicitly authorize payment of impairment awards to PTD workers. However, its decision interpreting those sections was based in part upon its determination that section 39-71-703, MCA (1991, 1997), did not link impairment awards to PPD benefits. *Rausch*, ¶ 22.

¶9 Unlike the 1991 and 1997 versions, the 1987 and 1989 versions of section 39-71-703, MCA, specifically provide that "[t]he benefits available for permanent partial disability are *impairment awards* and wage supplements," thus impairment awards are part of PPD benefits. More importantly, subsection (1)(a)(iv) of section 39-71-703, MCA (1987-89), expressly provides for recoupment of any impairment award to a worker who thereafter becomes PTD. The subsection provides:

(iv) If a worker becomes eligible for permanent total disability benefits, the insurer may recover any lump-sum advance paid to a claimant for impairment, as set forth in 39-71-741(5). Such right of recovery does not apply to lump-sum benefits paid for the period prior to claimant's eligibility for permanent total disability benefits.

This subsection cannot be reconciled with an interpretation of sections 39-71-710 and -737, MCA (1987-89), as implicitly authorizing impairment awards to PTD workers. If these sections *implicitly* authorize payment, then section 39-71-703(1)(a)(iv), MCA (1987-89), *expressly* authorizes the insurer to seek repayment of the award, creating an absurd situation of "what the Act giveth it then taketh away." Thus, I conclude that the 1987 and 1989 versions of the Workers' Compensation Act, do not expressly or implicitly authorize payment of impairment awards to PTD claimants.

JUDGMENT

¶10 The request of claimants' attorneys for a subpoena is **denied** based upon the Court's determination in *Ruhd v. Liberty Northwestern Ins. Corp.*, 2003 MTWCC 38, that common fund attorney fees are limited to claimants of the respondent insurer.

¶11 Permanently totally disabled claimants injured between July 1, 1987 and June 30, 1991, are not entitled to impairment awards.

¶12 This Judgment, as well as the Court's prior judgment concerning the amount of common fund attorney fees due claimants attorneys from impairment awards owed by the Montana State Fund to PTD claimants injured after July 1, 1991, are certified as final for purposes of appeal.

DATED in Helena, Montana, this 11th day of July, 2003.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Lon J. Dale
Mr. Thomas J. Murphy
Mr. Larry W. Jones
Mr. Monte D. Beck
Mr. Richard H. Davenport
Ms. Nancy Butler
Mr. Stephen D. Roberts
Mr. William Dean Blackaby

Ms. Laurie Wallace
Mr. Bradley J. Luck
Mr. David W. Lauridsen
Mr. Oliver H. Goe
Mr. Greg E. Overturf
Mr. Peter Strauss
Ms. Carol Glead
Mr. Thomas J. Harrington
Mr. Victor R. Halverson
Mr. Lucas J. Foust
Mr. David A. Hawkins
Mr. Thomas E. Martello
Mr. Rex Palmer
Mr. Geoffrey C. Angel
Mr. Lawrence A. Anderson
Mr. James G. Hunt
Mr. Mark E. Cadwallader

1. *Rausch, Fisch, Frost v. State Compensation Ins. Fund*, 2003 MT 2003, 311 Mont. 210, 54 P.3rd 25.