

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 30

WCC No. 9507-7347

DON FILCHER,

Petitioner,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY,

Respondent/Insurer for

BIG SKY CARE CENTER,

Employer.

DECISION AND ORDER

Summary: Insurer took offset relating to claimant's receipt of social security disability benefits by terminating his permanent total disability benefits prior to his reaching retirement age and by refusing to pay him an impairment award which it would otherwise have paid. Claimant argued that while the offset is authorized by statute, the insurer should be estopped from taking it.

Held: Insurer estopped from recouping social security offset where claimant relied on income without offset and where insurer, which did not take offset earlier based on erroneous information from the federal Railroad Retirement Board that claimant's federal benefits were retirement benefits, had ample information to put it on notice to investigate whether claimant's benefits were in fact disability benefits allowing an offset.

Topics:

Benefits: Social Security Offset. Insurer estopped from recouping social security offset where claimant relied on income without offset and where insurer, which did not take offset earlier based on erroneous information from the federal Railroad Retirement Board that claimant's federal benefits were retirement benefits, had ample information to put it on notice to investigate whether claimant's benefits were in fact disability benefits allowing an offset.

Benefits: Social Security Offset. The fact that a social security offset was not contemporaneously taken when biweekly benefits were paid does not alone

preclude the insurer from recovering overpayments resulting from the failure to contemporaneously take the offset. In *Belton v. Carlson Transport*, 220 Mont. 194, 196, 714 P.2d 148-149 (1986), the Supreme Court affirmed a decision of this Court permitting an insurer to recoup overpayments totalling \$18,461.58.

Benefits: Social Security Offset. An insurer has a duty to investigate prior to applying a social security offset. *Lovell v. State Compensation Mut. Ins. Fund*, 260 Mont. 279, 288-289, 860 P.2d 95, 101-102 (1993). That duty arises because the offset is limited to disability benefits payable because of the workers' compensation injury.

Estoppel and Waiver: Equitable Estoppel. Insurer estopped from recouping social security offset where claimant relied on income without offset and where insurer, which did not take offset earlier based on erroneous information from the federal Railroad Retirement Board that claimant's federal benefits were retirement benefits, had ample information to put it on notice to investigate whether claimant's benefits were in fact disability benefits allowing an offset.

This case is presented to the Court for decision on depositions and briefs. The issue is whether the insurer, National Union Fire Insurance Company, is entitled to a social security offset. It has already taken the offset by terminating permanent total disability benefits and refusing to pay an impairment award. The claimant, Don Filcher, through his petition, asserts that while the offset is authorized by statute National is estopped from taking it. He asks the Court to order National to pay the benefits it has withheld.

The depositions filed with the Court were those of the claimant, Gordon Amsbaugh, who initially adjusted the claim, Cathy Andersen, who took over from Amsbaugh, and Liesel Ann Curtiss, who provided vocational services. Since the case is presented on depositions and briefs, the Court will address the matter in narrative form. Citations to the record are limited to matters essential to resolution of the dispute.

Facts

On November 13, 1990, claimant injured his knee while working for Big Sky Care Center in Helena. Big Sky was insured by National, which accepted liability for the claim.

Claimant was able to continue working until October 1991, at which time his knee could no longer sustain his employment. At that time, National classified him as temporarily totally disabled and began paying temporary total disability benefits of \$284.12 per week.

In January of 1992, claimant applied for social security disability benefits. In light of his past employment in the railroad industry, his application was processed by the U.S. Railroad Retirement Board.

On February 9, 1992, claimant was notified that he was entitled to social security disability benefits. The notice was in writing. A copy is attached to claimant's deposition as deposition Exhibit 4. The notice read in relevant part:

We are writing to let you know that you are entitled to monthly **disability benefits** from Social Security beginning April 1992.

The Railroad Retirement Board will make Social Security payments to you. This is because you, your spouse or the person on whose Social Security record you filed worked for at least 10 years in the railroad industry.

(Filcher Dep. Ex. 4, emphasis added.)

According to claimant, he provided a copy of the February notice to Crawford and Company, which was acting as the adjuster for National. He was unsure whether he mailed it to Crawford or personally delivered a copy to Crawford's office:

Q. Who did you provide it [the February 1992 notice] to?

A. **I can't be sure**, but if I could wander a little on this again, the reason that I decided to move back to Helena or move back to Stevensville was this letter because it said that I was going to be granted disability benefits through Railroad Retirement Social Security which I had applied for.

Our home in Stevensville, we had been renting it out and the renters moved out. It was February. I no longer was able to work at the job I had here, and I had an opportunity to sell the mobile home that we owned here. So it seemed sensible to move back to our home in Stevensville. So I know I provided Crawford Insurance with this information. **I believe I dropped it at their office, but I may have mailed it.**

(Filcher Dep. at 16.) The adjuster in charge of claimant's file at that time, Gordon Amsbaugh, did not recall receiving a copy of the notice (Amsbaugh Dep. at 5) and there is no evidence that the notice reached the claim file.

Based on the recited testimony, I am unable to find as a matter of fact that Crawford or National received a copy of the February 1992 notice. Claimant did not recall how he delivered the notice. While his testimony was not impeached, neither was Amsbaugh's testimony. Lacking any objective evidence that either of these witnesses was untruthful, I can only conclude that both were telling the truth to the best of their recollection and that while claimant attempted to forward the letter to Crawford it did not in fact reach its intended destination.

Correspondence sent to Crawford by the Railroad Retirement Board did, however, suggest that Crawford was aware that claimant was pursuing disability benefits. In a March 17,

1992 letter, the Board wrote to Amsbaugh requesting information concerning claimant's workers' compensation benefits. (Amsbaugh Dep. Ex. 1.) A form was enclosed for Amsbaugh to complete and return. (*Id.*) On April 2, 1992, the Board again wrote to Amsbaugh asking him to complete and return the form. (*Id.* at Ex. 2.) It reiterated its request for a third time in an April 16, 1992 letter. (*Id.* at Ex. 3.) Information concerning workers' compensation benefits would have been pertinent to an application for social security disability benefits but had no relevance to social security retirement benefits.

Then, on May 1, 1992, the Railroad Retirement Board, sent another letter to claimant. (*Id.* at Ex. 4.) That letter is central to the dispute in this case; indeed, it caused the problem the Court must now resolve. It initially advised claimant that by law the Board was delegated the responsibility for determining his entitlement to social security benefits. (*Id.*) It went on to notify him that he was entitled to the "FOLLOWING SOCIAL SECURITY BENEFIT:"

SOCIAL SECURITY TYPE OF BENEFIT EFFECTIVE MONTHLY

CLAIM NUMBER DATE RATE

____-____-____ A **RETIREMENT 04-10-92** \$683.00

(*Id.*; emphasis added.) Thus, according to the notice, the *type* of benefits awarded was **retirement** benefits, **not** *disability* benefits. As the notice further stated, benefits commenced on **04-10-92**.

On April 10, 1992, claimant was four months shy of his sixty-second birthday. (Andersen Dep. at 13-14.) The adjuster's file reflected his birth date as August 10, 1930. (*Id.*)

The May 1, 1992 notice was provided by claimant to Liesel Ann Curtiss, who was employed by a sister company of Crawford. Curtiss was employed to assess claimant's disability. She forwarded the notice to Amsbaugh, who was still adjusting the claim.

Claimant told Curtiss that he had been awarded *disability* benefits. Curtiss passed that information on to Amsbaugh in a status report dated May 7, 1992, reporting that claimant was receiving disability benefits. (Curtiss Dep. Ex. 2.)

Thereafter, National continued to pay claimant temporary total disability benefits without any offset for his social security benefits. In May of 1994, the benefits were changed to permanent total disability benefits. The rate was the same and benefits continued to be paid without interruption until February 1995.

In May of 1994, Cathy Andersen succeeded Amsbaugh as the adjuster in charge of the claim. When she assumed responsibility for the file, she understood that claimant was receiving social security retirement benefits. (Andersen Dep. at 5.) Later in January of 1995, she had a telephone conversation with claimant in which claimant indicated that his social

security benefits were disability benefits. (Andersen Dep. at 7-9; Dep. Ex. 2.) Unlike Amsbaugh, Andersen acted upon the information immediately. She reviewed the file and found the May 1, 1992 notice, noting that it specified retirement benefits. On January 27, 1995, she sent off a speed letter to claimant, stating in relevant part:

After you called this week, I looked through your file to see where I had gotten the information that you were receiving SS Retirement. Please see the attached letter. This appears to indicate that your Social Security benefits are retirement benefits.

(Andersen Dep. Ex. 2.) The letter went on to notify claimant that if his benefits were indeed disability benefits, "then we will have to offset your TTD benefits, which will result in a substantial credit to us for an overpayment in benefits." (*Id.*)

Unlike Amsbaugh, Andersen did not ignore claimant's representations that his benefits were disability ones. She immediately sent out an information request to the Social Security Administration. (Andersen Dep. at 9.) During her deposition, she testified that the information request is "a **standard form** that we use requesting benefit information." (*Id.*) After receiving written verification from the Social Security Administration confirming that claimant's benefits were disability benefits, Andersen then telephoned the Railroad Retirement Board for further confirmation. (*Id.*) She completed the confirmation by February 7, 1995, a little more than a week after her speed letter to claimant. (*Id.*)

On February 7, 1995, Andersen wrote another letter to claimant advising him that National was entitled to an offset, resulting in claimant owing National \$11,474.14. (Andersen Dep. Ex. 4.) National then offset the overpayment against claimant's entitlement to further permanent total disability benefits, which amounted to \$5,143.25 for the months remaining until claimant reached age 65, and his entitlement to \$5,980.00 for an 8% impairment rating. (*Id.*) Since the offset left claimant owing more than his future benefits, National wrote to claimant on February 14, 1995, notifying him that unless he was willing to waive further benefits it would petition the Workers' Compensation Court to terminate benefits. (*Id.*) However, it never petitioned the Court, instead, it immediately cut off benefits. (Filcher Dep. at 22.) Claimant then brought the present petition.

In his deposition claimant testified that he relied on his monthly workers' compensation benefits. He testified that he "spent the money as I received it." (Filcher Dep. 22.) When his benefits were terminated he had to borrow \$4,800 from his brother-in-law to meet his expenses from the time of the cut-off until he began receiving social security retirement benefits. (*Id.* at 22-23.) His testimony was unrebutted and the Court adopts it as fact.

Discussion

Claimant, who was unrepresented by an attorney until his benefits were cut off, relied on his workers' compensation and social security benefits to meet his expenses. He did not provide a detailed explanation demonstrating that he spent more than he would have spent

had he known that a cutoff was coming; however, individuals and families generally adjust their expenditures in rough tandem to their incomes. While their adjustments may not perfectly track changes in income, reductions in income generally compel reductions in expenditures. Claimant's testimony, as general as it was, is sufficient to establish that while receiving workers' compensation benefits he spent more than he would have had he known he was facing a benefit cut-off. Without speculating on what he might have saved had he known an offset was down the road, I do not doubt that he would have saved something for that rainy day. The issue confronting the Court is whether the claimant's reliance on his workers' compensation benefits precludes National from taking an offset to which it is otherwise entitled.

By law an insurer is entitled to take an offset for social security benefits. The offset for both temporary and permanent total disability benefits is authorized in sections 39-71-701(4) and 39-71-702(4), MCA (1989). For each type of benefits, the offset statute is the same, providing:

(4) In cases where 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 such week, which amount is to be calculated from the date of the disability social security entitlement.

The purpose of the statute is to prevent duplication of benefits. *McClanathan v. Smith*, 186 Mont. 56, 67-69, 606 P.2d 507, 513-14 (1980).

The fact that the offset was not contemporaneously taken when biweekly benefits were paid does not preclude the insurer from recovering overpayments resulting from the failure to contemporaneously take the offset. In *Belton v. Carlson Transport*, 220 Mont. 194, 196, 714 P.2d 148-49 (1986), the Supreme Court affirmed a decision of this Court permitting an insurer to recoup overpayments totaling \$18,461.58. See also *Johnson v. Industrial Commission of Colorado*, 761 P.2d 1140, 1144-45 (Colo. 1988). Overpayments arise because social security benefits are often awarded retroactively or because insurers are not promptly notified of the awards.

In this case, however, claimant asserts that the doctrine of equitable estoppel precludes National from taking the offset.

[The doctrine of] equitable estoppel has long been recognized in Montana and is used to prevent injustice and to promote justice, honesty and fair dealing. It is founded in equity and good conscience and its object is to prevent a party from taking unconscionable advantage of his or her own wrong while asserting a strict legal right.

In re Marriage of K.E.V., 267 Mont. 323, 331, 883 P.2d 1246, 1251 (1994). The doctrine is applicable in workers' compensation cases. See *Ricks v. Teslow Consolidated*, 162 Mont. 469, 481-82, 512 P.2d 1304, 1311 (1973).

Six elements must be proved. *Id.* Those elements are as follows:

'(1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under the circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it, and (6) he must in fact act upon it in such a manner as to change his position for the worse.'

Dagel v. City of Great Falls, 250 Mont. 224, 234-35, 819 P.2d 186, 192-93 (1991) (adopting and quoting *Sweet v. Colborn School Supply*, 196 Mont. 367, 372-73, 639 P.2d 521, 524 (1982)).

Equitable estoppel is disfavored. *Bruner v. Yellowstone County*, 900 P.2d 901, 905 (Mont. 1995). The party invoking the doctrine -- here the claimant -- must prove all of the elements of the doctrine by clear and convincing evidence. *Id.*

Claimant has carried his burden with respect to elements (5) and (6). As noted in the opening paragraph of this discussion, claimant spent his workers' compensation benefits with the understanding that he was entitled to them without offset. He did not adjust his expenditures downward and save for the rainy day that was coming. He in fact relied on the payments and changed his position for the worse.

Element (4) is also met. Continued payment of the full amount of total disability benefits constituted "circumstances" under which it was "both natural and probable" that claimant would rely upon the full benefits. *Marriage of K.E.V.* at 332, 883 P.2d at 1251.

Similarly, element (3) is satisfied. Claimant was unaware that a social security offset would apply. Thus he lacked knowledge of the truth of the matter.

Passing, for the moment, over element (2), I also find that element (1) was met. That element requires "conduct, acts, language, or silence amounting to a representation or a concealment of material facts." *Marriage of K.E.V.* at 331, 883 P.2d at 1251. Payment of the benefits constituted both conduct and an act. The continued payment of the full benefits without any reservation of rights or indication of an entitlement to an offset amounted to a

representation that claimant was entitled to the full benefits. See *Sweet v. Colborn School Supply*, 196 Mont. 367, 373, 639 P.2d 521, 525 (1982) (holding that Burlington Northern's maintenance of a crossing and its permitting the public to use it for over sixty years amounted to a representation that the crossing was a proper one.) The amount of the benefits was material since it affected claimant's expenditures and savings.

Element (2) has been left to last because it is the final and decisive element in this case. That element requires that at the time of payment of benefits National had knowledge of the relevant facts regarding its entitlement to a social security offset, or that "at least the circumstances . . . [were] such that knowledge" must be imputed to National. *Marriage of K.E.V.* at 332, 883 P.2d at 1251. Representations based on mistake or made without full knowledge of the facts are insufficient to establish an estoppel. *Metcalf v. Barnard-Curtis Co.*, 120 Mont. 50, 57, 180 P.2d 263, 266 (1947).

The evidence presented by claimant failed to establish that when paying benefits National or its adjuster had actual knowledge of National's entitlement to a social security offset. There was un rebutted testimony by the adjusters that until January 1995, they understood the social security benefits paid to claimant to be *retirement* benefits. While they were informed by claimant in May 1992 that he was receiving disability benefits, the document claimant delivered to Curtiss at that time, and which Curtiss passed on to Amsbaugh, specifically stated that claimant was receiving *retirement* benefits.

Since the insurer did not have actual knowledge, claimant can prevail only if he can show that the circumstances were such that knowledge must nonetheless be imputed to National. *Marriage of K.E.V.* at 332, 883 P.2d at 1251. Such imputation is justified only if the insurer had a legal duty to further investigate the nature of the claimant's social security benefits.

The Supreme Court has previously held that the insurer has a duty to investigate prior to applying a social security offset. *Lovell v. State Compensation Mutual Ins. Fund*, 260 Mont. 279, 288-289, 860 P.2d 95, 101-102 (1993). That duty arises because the offset is limited to disability benefits payable because of the workers' compensation injury. Thus, prior to taking an offset the insurer must confirm that the social security determination was based on the industrial injury. *Id.*

In this case, Andersen's response to claimant's statement concerning the type of benefits he was receiving shows that she did not consider the May 1, 1992 notice conclusive and recognized that the notice might have been in error. Her testimony further established that she had a quick and easy means to determine whether claimant in fact was receiving disability benefits. She obtained that confirmation within a week and a half. In view of Andersen's response, Amsbaugh's failure to heed the information furnished by Curtiss, as well as information implied in the three written inquiries from the Railroad Retirement Board, was inexplicable. Moreover, the adjuster's file contained information about

claimant's age. A file review would have alerted Amsbaugh in May of 1992 that claimant was ineligible for retirement benefits on May 1, 1992.

Failure to promptly apply the offset has foreseeable consequences, as shown by this case. People tend to adjust their spending levels in rough tandem with their income. Failure to take the offset for years may put a claimant in a worse financial position than he would have been had the offset been timely taken.

Amsbaugh had ample information to put him on notice that the Railroad Retirement Board letter of May 1, 1992, may have been erroneous. He had easy and quick means to confirm the accuracy of the notice, but did nothing. His failure starkly contrasts with Andersen's immediate attention to the matter. In light of the foreseeable harm to claimant resulting from a failure to timely take an offset, I find that Amsbaugh had a duty to investigate in May 1992, and that knowledge of the true nature of claimant's social security must be imputed to him at that time. I therefore find all of the elements for estoppel satisfied.

Moreover, National is further estopped from taking an offset with respect to the permanent total disability benefits paid to claimant. At the time of claimant's injury, section 39-71-710, MCA, provided that liability for permanent total disability benefits ceases upon the injured worker reaching age 65 or upon his receipt of social security retirement benefits. The statute is a matter of Montana law. Knowledge of the provision is therefore imputed to workers' compensation adjusters and insurers. Amsbaugh's and Andersen's testimony established their belief that claimant was receiving social security retirement benefits. Thus, the payment of the permanent total disability benefits must be deemed to have been made with full knowledge that claimant was not entitled to benefits.

JUDGMENT

1. National Union Fire Insurance Company is estopped from taking a social security offset. It shall pay claimant the sum of \$11,123.25 in a lump sum.
2. Claimant is entitled to costs in an amount to be determined by the Court. Petitioner shall have 10 days in which to file his verified statement of costs. Respondent shall have 10 days thereafter in which to file its objections, if any.
3. This judgement is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have 20 days in which to request a rehearing or amendment of this decision and order.

Dated in Helena, Montana, this 15th day of April, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Robert B. Brown
Mr. Thomas A. Marra
Submitted March 4, 1996