IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 56

WCC No. 2000-0023

WCC No. 2000-0030

WCC No. 9907-8274

CHARLES FISCH, individually and on behalf of others similarly situated,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

DRY CREEK EXCAVATION,

Employer.

THOMAS FROST, individually and on behalf of others similarly situated,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

CLICK'S CONSTRUCTION,

Employer.

ALEXIS RAUSCH as the Conservator for KEVIN RAUSCH,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

LARSON LOGGING, INCORPORATED,

Employer.

ORDER AND DECISION DISPOSING OF NON-CONSTITUTIONAL ISSUES

REVERSED & REMANDED 9/05/02

Summary of case: The claimant in each of these three cases is premanently totally disabled and seeks an impairment award in addition to the permanent total disability (PTD) benefits he is receiving. The parties stipulated to the facts and the issues to be resolved by the Court, including when an impairment award is due, whether it can be paid concurrently with PTD benefits, and how it should be classified. Claimants also seek attorney fees with respect to their individual claims and common fund attorney fees with respect to other similarly situated claimants. Following the stipulation, the State Fund offered to pay the impairment awards in lump sums. The offer was accepted by the claimant. The State Fund then moved to dismiss all issues except the classification issue.

Held: (1) The motion to dismiss issues is denied. One claimant did not accept the offer and all issues remain as to him. Moreover, the remaining claimants are seeking class certification and the questions are not moot as to any potential class.

(2) The questions posed to the Court can be answered only by first identifying the statutory basis for impairment awards to permanently totally disabled claimants. The 1991 law applies to one claimant and the 1997 law to the other two. Under both laws, the Court is unable to find authority for the awards. Since claimants cannot work at all, they are not permanently partially disabled (PPD) and are ineligible for impairment awards payable to PPD claimants. The 1997 law claimants are not entitled to an impairment award as provided under section 39-71-703(2), MCA, as that entitlement is for claimants suffering impairments but no wage loss, and they have suffered a wage loss. Language in section 39-71-703(1) (1991 and 1997), MCA, which authorizes PPD benefits where a worker "is no longer entitled to temporary total or permanent total disability benefits" must be read together with the further requirement that the claimant must also be PPD. Section 39-71-737, MCA, concerning concurrent and consecutive payment of benefits does not create an entitlement to an impairment award or any other new benefits, it applies only to benefits which are payable under other sections. Language authorizing payment of an impairment award upon retirement, section 39-71-710, MCA, also does not create any new entitlement to an impairment award. It simply continues the liability for an impairment award due under other sections. *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986), distinguished. Lacking any statutory basis for an impairment award, issues concerning impairment awards are moot.

(3) The constitutional challenge to any denial of impairment awards to PTD claimants is reserved for further briefing and argument.

(4) Claimants' requests for attorney fees and penalties will be decided following resolution of the constitutional challenge.

Topics:

39-71-703 (1991 and 1997). Section 39-71-703, (1991 and 1997), MCA, does not authorize payment of impairment awards to permanently totally disabled claimants. Since claimants cannot work at all, they are not permanently partially disabled and are ineligible for impairment awards payable to PPD claimants. Language in section 39-71-703(1) (1991 and 1997), MCA, which authorizes PPD benefits where a worker "is no longer entitled to temporary total or permanent total disability benefits" must be read together with the further requirement that claimant must be PPD. Section 39-71-737, MCA concerning concurrent and consecutive payment of benefits does not create an entitlement to an impairment award or any other new benefits, it applies only to benefits which are payable under other sections. Language authorizing payment of an impairment award upon retirement, section 39-71-710, MCA, also does not create any new entitlement to an impairment award. It simply continues the liability for an impairment award due under other sections.

Class Actions. In case raising issue of whether and when PTD claimants are entitled to payment of an impairment award, insurer offered to pay impairment awards in a lump sum. One named claimant did not accept the offer. Insurer's motion to dismiss all but class certification issues as to claimants who did accept offer was denied where issues remained as to putative class these claimants purport to represent.

Impairment: Generally. Court finds no statutory basis under 1991 or 1997 WCAs for payment of impairment award to permanently totally disabled claimants. Since claimants cannot work at all, they are not permanently partially disabled and are ineligible for impairment awards payable to PPD claimants. Language in section 39-71-703(1) (1991 and 1997), MCA, which authorizes PPD benefits where a worker "is no longer entitled to temporary total or permanent total disability benefits" must be read together with the further requirement that claimant must be PPD. Section 39-71-737, MCA concerning concurrent and consecutive payment of benefits does not create an entitlement to an impairment award or any other new benefits, it applies only to benefits which are payable under other sections. Language authorizing payment of an impairment award upon retirement, section 39-71-710, MCA, also does not create any new entitlement to an impairment award. It simply continues the liability for an impairment award due under other sections. Constitutional

challenge to denial of impairment awards to PTD claimants reserved for further briefing and argument.

¶1 These three cases are submitted upon stipulated facts. They present common questions concerning impairment awards for permanently totally disabled claimants. The parties ask the Court to determine when impairment awards are due and whether they may be paid concurrently with permanent total disability benefits. Claimants also ask the Court to determine how the awards should be classified or characterized. Finally, they seek attorney fees and penalties. The cases have been consolidated for purposes of disposing of those issues, but not for other purposes.

Facts

¶2 The facts are stipulated. All three of the claimants are permanently totally disabled as the result of industrial injuries. Kevin Rausch (Rausch) suffered a head and spinal cord injury on July 8, 1992, and is a quadriplegic with brain damage. Charles Fisch (Fisch) suffered a spinal cord injury on July 9, 1998. He is an incomplete quadriplegic. Thomas Frost (Frost) suffered a back injury on August 30, 1997. He has undergone four surgeries to date. The State Compensation Insurance Fund (State Fund) insured each claimant's employer and has accepted liability for each of the injuries.

¶3 Each claimant has reached maximum medical improvement (MMI). Impairment ratings have been rendered - 96% for Rausch, 74% for Fisch, and 25% for Frost. None of the three claimants has ever been in a permanent partial disability status. Upon reaching MMI, each claimant was converted to permanent total disability status. The parties agree that all claimants will continue to be permanently totally disabled until they die or reach retirement age.

¶4 Although none of the claimants has reached retirement age, each of them demanded that he be paid an impairment award based on his impairment ratings. The State Fund refused, taking the position that impairment awards for permanently totally disabled claimants are not due until claimants receive social security retirement benefits or become entitled to full social security retirement benefits. However, following this Court's March 17, 2000 decision in *Sharp v. Montana Municipal Insurance Authority*, 2000 MTWCC 13, the State Fund offered to pay out impairment awards, in full and without discount, to all three of the claimants. The State Fund also offered to pay each of the claimant's attorney fees with respect to the awards. The offers were made for purposes of resolving the present litigation: The State Fund does not concede that it is legally required to pay the awards to these or any other permanently totally disabled claimant. While claimants Fisch and Frost have accepted the offers, claimant Rausch indicates he is unwilling to do so unless the award is characterized as a permanent total disability benefit. (Petitioner Kevin Rausch's Reply Brief at 14.)

Issues

¶5 On March 31, 2000, the parties filed a stipulation, setting forth both the agreed facts and the issues to be decided by the Court. The issues, as stated, are:

- Whether or not, under the 1991 and/or 1997 Workers' Compensation Act, a person classified as permanently totally disabled, who has never received permanent partial disability benefits, is entitled to receive both an impairment award and permanent total disability benefits at the same time.
- In the event that Issue 1 is answered in the affirmative, whether or not an impairment award of the permanently, totally disabled person is due immediately, without the necessity of the death of the permanently, totally disabled person or the permanently, totally disabled person reaching age 65.
- In the event that Issues 1 and 2 are decided in the affirmative, whether the impairment award to which the permanently, totally disabled person is entitled is to be classified as partial permanent disability benefits or permanent total disability benefits.
- Whether Petitioners are entitled to attorney fees under § 39-71-611 MCA and 20% penalties under § 39-71-2907 MCA.
- Whether Petitioner's attorneys are entitled to common fund attorney fees under *Murer v. State Workers' Compensation Mutual Ins. Fund* for all similarly situated permanent total disability claimants for whom the State Fund has not paid impairment awards, where there is either an undisputed impairment rating or the State Fund has not obtained an impairment rating.

(Stipulation at 6.) In addition, claimants assert constitutional grounds to support their argument for full, immediate payment of impairment awards to permanently totally disabled individuals. The constitutional challenge was severed during oral argument and deferred until the non-constitutional arguments are decided.

Motion to Dismiss

¶6 Based upon its offer to pay impairment awards to claimants (*see* ¶ 4), the State Fund filed a motion to dismiss (March 31, 2000) arguing that all issues, save number three, are moot. At hearing, however, counsel for the State Fund conceded that in light of claimant Rausch's rejection of its offer, all issues are joined as to him. Therefore, I need only consider the motion with respect to claimants Fisch and Frost.

¶7 Fisch and Frost brought their petition not only on their own behalf but on behalf of a putative class of similarly situated claimants. They have requested class certification. In that light, I find that the State Fund's offer does not moot the issues they raise.[(1)] Moreover,

to determine what class of benefits their impairment awards belong to, I must determine the authority for payment of the awards, thereby addressing issues one and two. Also, the penalty and attorneys' fee issues remain. The motion to dismiss is **denied**.

Discussion

¶8 The questions presented present difficult questions of statutory interpretation. To determine when the award is due, and to classify the benefit, I must determine the legal authority for the award. That task has turned out to be significantly more difficult than I anticipated at the time of oral argument.

¶9 In oral argument, the claimants' attorneys cited *Holton v. F.H. Stoltze Land and Lumber Co.*, 195 Mont. 263, 637 P.2d 10 (1981), as authority for payment of impairment awards to permanently totally disabled claimants upon their reaching MMI. *Holton,* however, is inapposite. That case considered the award of a penalty where an insurer **admitted** that an impairment award was due a permanently partially disabled claimant; it did not decide that a permanently totally disabled claimant is entitled to an impairment award. More importantly, it was decided under laws that have been substantially amended in ensuing years. Workers' compensation benefits are a creation of statute and Courts must follow and apply the statutes as they are written. *See Ingraham v. Champion International,* 243 Mont. 42, 48, 793 P.2d 769, 772 (1990) ("The power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted.").

¶10 I must therefore rely on the specific statutes in effect at the time of each claimant's injury to determine his entitlement to an impairment award. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Claimant Rausch's entitlement is governed by the 1991 version of the Workers' Compensation Act, claimants Fisch and Frost by the 1997 version.

¶11 Section 39-71-702, MCA (1991 and 1997), govern permanent total disability benefits. Impairment awards are not among the benefits described in either version of the section.

¶12 The only section directly authorizing impairment awards is section 39-71-703, MCA, which governs permanent partial disability benefits. The 1991 and 1997 versions of the section differ somewhat.

¶13 The 1997 version is identical in all respects to the 1995 version except for subsection (3), which was amended in 1997 by changing the reference in that subsection from "subsection (4)" to "subsection (5)". As amended in 1997, section 39-71-703, MCA, provides in relevant part:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary

total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks.

(4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

¶14 In *Sharp v. Montana Municipal Insurance Authority,* 2000 MTWCC 13*,* I determined that under the 1995 version of section 39-71-703, MCA, a permanently totally disabled claimant is not entitled to the impairment award provided therein for permanently partially disabled claimants. That conclusion rests on the express criteria of subsection (1). Under subsection (1) a worker is entitled to permanent partial disability benefits, which include the impairment award mentioned in subsection (5), **only if** the worker "**suffers a permanent partial disability**" *and* is no longer entitled to either temporary or permanent total disability benefits. Permanent partial disability is defined in section 39-71-116(23), MCA (1997), and 39-71-116(22), MCA 1995, which are identical. The subsection provides:

"Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) **is able to return to work in some capacity** but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.

As I held in *Sharp*:

> The language of these sections is plain and clear, therefore they require no interpretation and must be applied as written. *State v. Dahlin,* 289 Mont. 182, 187, 961 P.2d 1247, 1250 (1998). Under the definitional section (39-71-116(22), MCA), a worker is not permanently partially disabled unless he or she is able to return to work in some capacity. A permanently totally disabled worker, who cannot return to work in any capacity, does not satisfy the requirement, does not suffer a permanent partial disability, and is not entitled to permanent partial disability benefits under section 39-71-703(1), MCA.

Sharp ¶ 6.

¶15 I went on in *Sharp* to discuss subsection (2), which provides for an impairment award for a worker who "has no actual wage loss as a result of the injury" and therefore is ineligible for the impairment award under permanent partial disability provisions. I found that subsection inapplicable as well, noting that a permanently totally disabled claimant is "ineligible under the subsection since he has suffered a wage loss." *Id*. ¶ 7. I never did decide what statute, if any, authorizes an impairment award for a permanently totally disabled claimant who has never been in permanent partial status. In a footnote to paragraph 7 I said: "The parties agree that claimant is entitled to an impairment award, therefore, the Court need not consider the statutory basis for such award."

¶16 I reaffirm *Sharp*, and must determine what, if any, other statute authorizes payment of an impairment award to a permanently totally disabled claimant who has never been in a permanent partial disability status.

¶17 It might be argued, although it has not been, that subsection (1) of section 39-71-703, MCA (1997), should be construed as authorizing permanent partial disability benefits for permanently totally disabled individuals when they receive or are eligible for social security retirement benefits, § 39-71-710, MCA (1997). That argument rests on the language in subsection (1) which refers to a worker who "is no longer entitled to temporary total or permanent total disability benefits." That language, however, cannot be isolated from other language in the subsection which creates a threshold requirement that the claimant be permanently partially disabled. The section must be construed in its entirety and all of its language reconciled and given effect. "In construing a statute, a court must reject a construction that would leave any part of the statutory language without effect--the court must give effect to all relevant provisions of the statute. " *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997). Applying a threshold, permanent partial disability requirement does not render the subsection's reference to permanent total disability meaningless. A permanently totally disabled individual may later become employed or employable through retraining or improvement in his or her condition, and, thus, may no longer be permanently totally disabled.

¶18 I reach the same conclusions with respect to section 39-71-703, MCA (1991), which provides in relevant part:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.
>
> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
>
> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:
>
> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
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> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;
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> (c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%; and
>
> (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

As with the 1997 version, the 1991 statute extends permanent partial disability benefits only to "an injured worker [who] suffers a permanent partial disability." There is no separate provision, as in the 1997 Act, for payment of an impairment award to a worker suffering an impairment but not a wage loss, and the 1991 definition of permanent partial disability is

identical to the 1997 definition. § 39-71-116(22), MCA(1995). Claimant Rausch is not permanently partially disabled and not entitled to permanent partial disability benefits.

¶19 All claimants find the authority for payment of an impairment award in section 39-71-737, MCA. The 1997 version of the section provides:

> **39-71-737. Compensation to run consecutively - exceptions.** Compensation must run consecutively and not concurrently, and payment may not be made for two classes of disability over the same period, except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits.

The 1991 version, while containing additional provisions, is identical with respect to impairment awards, providing:

> **39-71-737. Compensation to run consecutively -- exceptions.** Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits, and wage supplement and partial rehabilitation benefits may be paid concurrently.

Neither version creates any entitlement to an impairment award, or for that matter to auxiliary benefits or any other benefits. It only prescribes when different classes of benefits which are authorized in other sections may be paid concurrently. The claimant must be due the benefits in the first place for the section to apply.

¶20 Claimants argue that failure to interpret section 39-71-737, MCA, as entitling permanently totally disabled claimants to impairment awards would render the section's reference to impairment awards meaningless. If that were so, the Court might have to deem the statute ambiguous and consider the maxim of statutory interpretation that courts should attempt to construe a statute in a manner which does not render it meaningless, *Albright v. State By and Through State,* 281 Mont. 196, 206, 933 P.2d 815, 821 (1997). However, failure to adopt claimants' interpretation does not render the language meaningless. There are other benefits which a claimant might receive concurrently with an impairment award, specifically, an award for disfigurement, § 39-71-708 (1991, 1997), MCA, and rehabilitation benefits, §§ 39-71-1006, MCA (1997), 39-71-2001, MCA (1991).

¶21 Finally, I consider section 39-71-710, MCA, which also refers to impairment awards. The 1997 and 1991 versions differ in minor respects which are immaterial here. The 1997 version of the section provides:

> **39-71-710. Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social

security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. **However, the insurer remains liable** for temporary total disability benefits, **any impairment award**, and medical benefits.

(2) If a claimant who is eligible under subsection (1) to receive retirement benefits and while gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits. [Emphasis added.]

The 1991 version provides:

39-71-710. Termination of benefits upon retirement. (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent total disability, and rehabilitation compensation benefits. **However, the insurer remains liable for** temporary total disability benefits, **any impairment award**, and medical benefits.

(2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits. [Emphasis added.]

Use of the language "remains liable for . . . any impairment award" can only be construed as indicating that liability for the award must exist in the first instance, independently of section 39-71-710, MCA. As with section 39-71-737, MCA, section 39-71-710, MCA, does not create any entitlement to benefits but only considers the payment of benefits created elsewhere in the Act.

¶22 In concluding that section 39-71-710, MCA, does not create an entitlement to an impairment award, I considered the Supreme Court's decision in *Hunter v. Gibson Products of Billings Heights, Inc.,* 224 Mont. 481, 730 P.2d 1139 (1986), in which the Court interpreted the 1983 version of section 39-71-710, MCA, as providing for payment of permanent partial disability benefits to a permanently totally disabled claimant whose permanent total benefits were terminated due to receipt of social security retirement benefits. At that time, section 39-71-710, MCA, provided:

> If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. This section does not apply to permanent partial disability benefits. Medical benefits are expressly reserved to the claimant.

¶23 In construing the section, the Supreme Court in *Hunter* quoted extensively from a prior decision of this Court in *Johnson v. Peter Kiewit & Sons, Inc.,* WCC No. 8411-2704 (1985). That case involved a 67 year old worker who was receiving social security benefits but was supplementing the benefits by working. She was injured at work. After initially paying temporary total disability benefits, the insurer discontinued those benefits based on section 39-71-710, MCA. She then sought permanent partial benefits. Citing equitable considerations, this Court construed section 39-71-710, MCA, as authorizing PPD benefits to totally disabled workers:

> . . . [E]quity demands that individuals in the claimant's situation can be compensated to some degree for injuries suffered while working. Otherwise, a nonsensical result would follow: A "retired" individual who is only slightly injured would qualify for workers' compensation benefits, while a "retired" individual who suffers a permanently totally disabling injury would not.
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> . . . If Section 39-71-710, MCA, were strictly construed, [claimant's] injury would be completely noncompensable.
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> **To avoid this unjust result, this Court concludes that the permanently totally disabled claimant is entitled to receive permanent partial disability benefits pursuant to MCA Section 39-71-710. The Court is aware that it is stretching its mandate of liberal construction, but it has not stretched it to the breaking point.**

Hunter, 224 Mont. at 484, 730 P.2d at 1141 (emphasis added). In its decision in *Hunter*, this Court extended the logic to cases in which the claimant was injured prior to receiving retirement benefits.

¶24 After quoting from *Johnson* the Supreme Court in *Hunter* adopted this Court's construction of section 39-71-710, MCA, citing the liberal construction rule mandated at that time:

> Claimant contends Section 39-71-710, MCA, does not address the specific facts of this case. **However, liberal construction of the statute, as mandated by Section 39-71-104, MCA, results in the conclusion claimant is entitled to an award of permanent partial benefits upon reaching the age of 65**.

> Section 39-71-710, MCA, explicitly provides: "This section does not apply to permanent partial disability benefits." In the present case, claimant, who had been receiving temporary total disability benefits, petitioned the Workers' Compensation Court for an award of permanent partial benefits commencing on her 65th birthday.
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> As noted by the Workers' Compensation Court in *Johnson*, supra, strict construction of Section 39-71-710, MCA, would result in an absurdity: A worker injured past the age of 65 may recover compensation if partially disabled but not if totally disabled. We agree with the court's interpretation of Section 39-71-710, MCA, allowing for payment of permanent partial disability benefits to a permanently totally disabled claimant who has reached the age of 65.

Hunter, 224 Mont. at 484-85, 730 P.2d at 1141 (emphasis added).

¶25 The rule of liberal construction was repealed in 1987. 1987 Mont. Laws, ch. 464, § 68. Moreover, section 39-71-710, MCA, has been substantially amended (as has section 39-71-703, MCA) and can be construed as written without giving rise to the absurd identified in *Hunter* and *Johnson*.[(2)] At the time of *Hunter,* section 39-71-710, MCA, provided for post-retirement continuation of full permanent partial disability benefits. The 1991 and 1997 versions of the section do not. While the amendments allow a permanently partially disabled individual to receive some additional benefits post-retirement age in the form of an impairment award, all benefits based on wage loss and other factors are cut off. In addition, since *Hunter* the legislature has sharply curtailed permanent partial disability benefits but not permanent total disability benefits. That sharp reduction in benefits provides a good reason for permitting an impairment award to be paid out to a partially disabled claimant reaching retirement age but not to a totally disabled claimant.

¶26 Most importantly, the language of the 1991 and 1997 versions of section 39-71-710, MCA, constrain the application of the maxims invoked in *Hunter*. As already noted in paragraph 21, use of the language "remains liable for . . . any impairment award" can only be construed as indicating that liability for the award must exist in the first instance, independently of section 39-71-710, MCA. The language is plain on its face and must be applied as written. The Court cannot write in a new provision for an impairment award to which a claimant is not already entitled. "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.

¶27 In conclusion, I fail to find any statutory basis for payment of an impairment award to a permanently totally disabled worker. Since there is no basis for such payment, there is no basis for holding that such an award may be paid concurrently with permanent total disability benefits. Thus, the first issue raised by the parties must be answered in the negative. Since the other issues concerning impairment awards depend on an affirmative answer to the first issue, they are moot.

¶28 Finally, claimants have raised a constitutional issue which must be addressed in light of the foregoing decision. In their fourth contention of the stipulation, they contend:

> 4. It is the position of the Petitioner[s] that permanently, totally disabled persons should have the same right to receive an impairment benefit as those individuals classified as partial, permanently disabled and [to] not allow the payment of an impairment benefit, classified as a permanent total benefit to a totally disabled person, is a violation of substantive due process and equal protection as those terms are defined by Montana case law and constitutional law, specifically, Article II, of the Montana Constitution.

(Stipulation at 4.) During oral argument, I bifurcated this issue, reserving it for further argument in the event of a decision adverse to claimants on their statutory arguments. This issue therefore remains and will be considered after further briefing and argument. I will rule on the penalty and attorneys' issues when the constitutional challenge is resolved.

ORDER

¶29 1. Permanently totally disabled workers are not entitled to impairment awards under the 1991 and 1997 Montana Workers' Compensation Acts, whether concurrently, upon reaching retirement age, or otherwise. However, the State Fund's agreement to pay lump-sum impairment awards to claimants Fisch and Frost is enforceable.

¶30 2. No determination concerning the constitutional issue raised by claimants is made at this time. That issue shall be further briefed and argued. A separate scheduling order shall issue.

DATED in Helena, Montana, this 13th day of September 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Monte D. Beck
Mr. Stephen D. Roberts
Mr. Lon J. Dale
Mr. Greg E. Overturf
Date Submitted: May 3, 2000

1. I do not decide here whether class certification is appropriate. That matter will be considered separately.

2. Section 39-71-710, MCA (1991, 1997), has two subparts. The first, which is at issue in this case, applies to claimants injured before reaching social security retirement age. The second applies to workers injured after they have reached that age. I do not consider

whether construction of the second subpart as precluding an impairment award to a permanently totally disabled worker would create an absurd result.