

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9210-6608

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

HENRY G. GARCIA

Claimant/Respondent.

**ORDER ADOPTING FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
HEARING EXAMINER AND ENTERING JUDGMENT**

The above-entitled matter was duly heard by Court-appointed Hearing Examiner, ROBERT J. CAMPBELL who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

The Workers' Compensation Judge recused himself in the above-entitled matter. The Honorable Jeffrey Sherlock, District Judge of the First Judicial District, assumed jurisdiction on October 8, 1993.

Thereupon, the Court considered the record in the above-captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant's former counsel, Kurt M. Jackson, was properly dismissed June 28, 1993 as a party herein.

3. Petitioner, State Fund, has not presented sufficient credible evidence to show a change in claimant's disability since the April 4, 1990 Judgment of this Court awarding permanent partial benefits to the claimant.

4. Petitioner, State Fund, is not entitled to reimbursement of any attorney fees paid by it as a result of this Court's Orders of April 4, 1990 and May 18, 1990.

5. Co-Respondent Kurt M. Jackson is not entitled to additional attorney fees and costs for defense of this action pursuant to section 39-71-612, MCA (1985).

6. Respondent Henry G. Garcia is not entitled to attorney fees and costs for the defense of this action pursuant to section 39-71-612, MCA (1985).

7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Proposed Judgment.

8. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

9. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 29th day of November, 1993.

(SEAL)

JEFFREY SHERLOCK, JUDGE

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9210-6608

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

HENRY G. GARCIA

Claimant/Respondent.

Presiding Hearing Examiner: ROBERT J. CAMPBELL

Counsel of Record:

Mr. Charles G. Adams
Legal Counsel
State Compensation Insurance Fund
P.O. Box 4759
Helena, MT 59604-4759

ON BEHALF OF THE PETITIONER

Mr. Kenneth R. Olson
Attorney at Law
600 Central Plaza, Suite 316
Great Falls, MT 59401

ON BEHALF OF THE RESPONDENT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

1. Petitioner filed this action to resolve a dispute between itself, the claimant and claimant's former counsel. The dispute arose under Title 39, chapter 71, part 29, MCA.
2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.
3. A pretrial conference was conducted on December 29, 1992 and January 29, 1993, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on March 15, 1993. Pertinent parts of the Pretrial Order are as follows:

I. STATEMENT OF JURISDICTION

The Workers' Compensation Court has jurisdiction in the above-entitled matter pursuant to Section 39-71-2905, MCA. However, Co-Respondent does not agree that the Workers' Compensation Court has jurisdiction over him in the above-entitled matter. Co-Respondent has filed a motion to dismiss or for summary judgment contending that the

Court lacks jurisdiction over the co-respondent under § 39-71-2909, M.C.A., the statute under which petitioner seeks reimbursement of attorney fees. [MOTION DENIED.]

....

III. STATEMENT OF UNCONTESTED FACTS

1. Claimant injured his low back on February 17, 1986, in an industrial accident while employed by Vita-Rich Dairy, Inc. Claimant's injury occurred in Great Falls, **Cascade County**, Montana. Claimant's employer was based in Havre, Montana. (Petitioner's Exhibit "A").

2. At the time of the injury, Claimant's employer was enrolled under Plan No. III of the Workers' Compensation Act, and its insurer is the State Compensation Mutual Insurance Fund.

3. Petitioner State Fund accepted liability for Claimant's industrial accident of February 17, 1986. Claimant received temporary total and permanent partial disability and medical benefits through his claim.

4. The subject industrial injury claim occurred prior to July 1, 1987 and the mandatory, non-binding mediation provisions of the Montana Workers' Compensation Act do not apply to this case.

5. Claimant Henry G. Garcia's case went to trial before the Workers' Compensation Court on September 26, 1989. Claimant elected and argued entitlement to benefits under Section 39-71-703, MCA (1985).

6. Prior to and after September 26, 1989, Petitioner paid permanent partial disability benefits to Claimant pending decision by the Court.

7. On April 4, 1990, the Workers' Compensation Court issued its Findings of Fact and Conclusions of Law and Judgment. In that judgment, the Court awarded 500 weeks of permanent partial disability benefits to Claimant at the rate of \$126.35 per week.

8. The Court on April 4, 1990 awarded attorney's fees and costs to Claimant's counsel. On or about May 30, 1990, the State Fund paid \$9,171.20 to Claimant's counsel, Kurt Jackson.

9. Petitioner State Fund continues to pay benefits to Garcia under the Court's April 4, 1990 Order.

4. The parties have proposed and the Court adopts the following issues to be decided by the Court:

1. Whether the Court's April 4, 1990 Findings of Fact and Conclusions of Law and Order should be modified pursuant to Sec. 39-71-2909, MCA.

2. Whether Claimant is entitled to permanent partial disability benefits after he returned to work post-Judgment.

3. Whether Petitioner is entitled to reimbursement of any permanent partial disability benefits after Mr. Garcia returned to work post-Judgment.

4. Whether Petitioner is entitled to reimbursement of any portion of attorney's fees paid by it as a result of the Court's Order of April 4, 1990 and May 18, 1990.

5. Whether the Court has jurisdiction under Section 39-71-2909, MCA to order repayment of attorney's fees.

6. Whether Co-Respondent is entitled to attorney's fees and costs for the defense of this action.

7. Whether Respondent is entitled to attorney's fees and costs for the defense of this action.

5. The trial in this matter came on April 29, 1993, in Great Falls, Montana, before Hearing Examiner Robert J. Campbell. James L. Gaither, Richard Hertz, Anne Arrington and Charles Edquest were sworn and testified. The deposition of Pat Onstead was submitted to the Court and admitted into evidence. Exhibit Nos. 1 through 6, and Nos. 12 and 13 were admitted into evidence by stipulation. Exhibit Nos. 10 and 11 were admitted into evidence without objection. Exhibit Nos. 7 through 9 were not admitted. Exhibit Nos. 14 through 21 were attached to the pretrial order and admitted by stipulation.

6. Petitioner, State Compensation Insurance Fund (State Fund), was represented by its counsel, Elizabeth A. Horsman-Wiitala. Henry G. Garcia, respondent, was not personally present but was represented by his counsel, Kenneth R. Olson and Kurt M. Jackson, former counsel to Mr. Garcia at a prior proceeding in this Court was present as co-respondent. After hearing the opening statements and arguments of counsel, the hearing examiner stated that he would allow the State Fund ten days to brief why the Court should not dismiss Mr. Jackson from this action. After the State Fund brief and response by Mr. Jackson, an Order was issued on June 28, 1993, dismissing Kurt M. Jackson as a party. Upon filing the Proposed Findings of Fact, Conclusions of Law and Reply Briefs from the remaining parties, this matter was deemed submitted on September 9, 1993.

7. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Proposed Judgment:

FINDINGS OF FACT

1. The uncontested facts are found as fact and adopted herein.

Claimant

2 At the time of trial, Henry Guy Garcia was 37 years old and incarcerated in a Federal detention center in Colorado.

3. Claimant injured his low back in an industrial injury February 17, 1986 while employed by Vita-Rich Dairy who was enrolled under Plan No. III of the Workers' Compensation Act. (Uncontested Facts 1, 2.)

4. Petitioner, State Fund, accepted liability for the industrial injury and paid the claimant temporary total, permanent partial and medical benefits. (Uncontested Fact No. 3.)

5. A dispute occurred as to the amount of permanent partial disability benefits claimant was entitled to and the claimant petitioned this Court to determine his permanent partial disability benefits under section 39-71-703, MCA (1985.) The trial was held on September 26, 1989, with Kurt M. Jackson representing the claimant.

6. On April 4, 1990, this Court issued its Findings of Fact, Conclusions of Law and Judgment awarding 500 weeks of permanent partial disability benefits to the claimant at the rate of \$126.35 per week. (Uncontested Fact No. 7.) The State Fund did not appeal the Order.

7. In the April 4, 1990 Order of this Court, Kurt M. Jackson, was awarded costs and attorney fees. After submission of his hours and hourly rate, which were not opposed by the State Fund, Mr. Jackson was awarded attorney fees of \$9,171.20 by Order of this Court on April 16, 1990. (Tr. Vol. I at 56.) The State Fund again did not appeal this Order awarding costs and attorney fees.

8. State Fund continues to pay the claimant permanent partial benefits to the claimant pursuant to this Court's order of April 4, 1990.

State Fund's Petition - Parties

9. On October 21, 1992, State Fund requested a reduction or termination of claimant's disability benefits and also repayment of attorney fees and costs paid to Mr. Jackson. The petition was based on section 39-71-2909, MCA (1985), which provides this Court the authority to review, diminish or increase previous awards if a change in disability has been proven.

10. Petitioner also requested that this Court amend the previous Judgment and rule that the claimant is not entitled to further permanent partial wage loss benefits previously awarded by the Judgment in this Court on April 4, 1990.

11. At trial petitioner's counsel in her opening statements clarified the present State Fund position as follows:

HEARING EXAMINER: Now, am I correct from what you said that you are asking the court to in effect terminate his permanent partial benefits as of April 20, 1991, is that correct?

MS. HORSMAN: That's correct, your, Honor.

THE COURT: Now, would that mean that everything before that date you're conceding was properly paid?

MS. HORSMAN: State Fund is conceding that it does not feel it has sufficient civil, it doesn't feel that it has enough evidence to support that he had demonstrated function prior to the time of capacity he demonstrated on April 20, 1991, and continuing.

HEARING EXAMINER: And you're not seeking to reopen or set aside the prior judgement of this court?

MS. HORSMAN: No, your Honor. This is a revision or amendment of the original order, based upon the new information, based upon again demonstrated function of this Workers' Compensation claimant.

HEARING EXAMINER: And this will be evidence as to what occurred after April 20, 1991? It would be the basis of cutting off the benefits?

MS. HORSMAN: Yes, your Honor.

(Vol. I at 34-35.)

12. Co-respondent, Kurt M. Jackson, was named as a party based upon his representation of the claimant and the attorney fee award he received by Order of this Court on April 16, 1990. Mr. Jackson at trial stated that his statement of hours was based on representing the claimant up to April 16, 1990, and it was not a contingency fee based on benefits due the claimant in the future. (Vol. I at 56.)

13. Based on the State Fund's representation in its opening statement and answers in response to the Court's questions on the fact the State Fund would not seek reimbursement of any funds paid prior to April 20, 1991, and the fact Mr. Jackson's fees were paid one year prior to that date, Mr. Jackson was dismissed as a party by summary judgment entered on June 28, 1993. Reconsideration of the Order was denied on July 26, 1993.

Evidence Presented As To Change In Disability

14. Claimant's injury consisted of a herniated L4-5 disc with nerve impingement as diagnosed by Dr. Brooke Hunter. (Ex. No. 18.) Dr. Hunter performed an independent medical examination of Mr. Garcia for the State Fund. There is no evidence that claimant has had surgery since the prior trial which would alter or improve the condition. There was

no medical evidence presented as to the extent claimant suffers from his herniated disc injury.

15. Neither party presented any evidence that claimant has been examined by a physician since the Judgment of this Court issued on April 4, 1990.

16. Petitioner, State Fund, presented evidence that after the April 1990 Judgment was entered in this Court, the claimant worked as a carpenter/laborer for Gaither Construction from April of 1991 to May of 1992. He received \$8.50 per hour in that employment. (Tr. Vol. II at 4.) His employer, Jim Gaither, knew that claimant suffered from a prior back injury and like other employees, claimant complained about his back occasionally. (Tr. Vol. II at 18.) Mr. Gaither had no way of determining whether claimant's injury had changed since the original trial of this case. (Tr. Vol. II at 19.)

17. Co-employee Pat "Rick" Hertz testified that he encouraged the claimant to do certain exercises to relieve discomfort caused by a low back injury, but had no information or expertise regarding whether the claimant's condition changed as a result of the workouts. (Tr. Vol. II at 40.)

18. Scott Cromwell testified by deposition that claimant was employed by Cromwell's Construction Company as a carpenter between May of 1992 and July of 1992 earning \$10.00 per hour. Mr. Cromwell is not a medical expert and could not testify whether claimant's medical condition had improved since April 4, 1990 and could not determine whether claimant could return to his former employments as a welder or dairy delivery man.

19. Terry Mehan and Pat Onstead were co-workers with the claimant when he worked for Gaither Construction. Both testified by deposition that they had no knowledge of the claimant's medical condition caused by his industrial injury or whether his condition had changed or improved. Neither could they testify whether claimant could return to his former employments as a welder or a dairy delivery man.

20. Vocational rehabilitation expert Anne Arrington was called by the State Fund. She is not a medical expert and admitted she could not state with any degree of certainty that claimant's medical situation had changed or whether the claimant continues to experience pain from his herniated disc. (Tr. Vol. II at 98.)

21. After examining the file of the prior trial, Anne Arrington testified that Judge Reardon's Finding of Fact No. 21 listed five occupations in which claimant could be employed with his transferable skills. Ms. Arrington admitted that claimant's earnings with the two construction companies of \$8.40 and \$10.00 per hour did not exceed those earnings contemplated by Judge Reardon's findings based upon the trial testimony of Michelle Row and the records submitted by Dr. James Hinde. (Tr. Vol. II at 115-119.) The State Fund did

not submit any expert vocational rehabilitation testimony at the prior trial to question the opinions of claimant's vocational evidence at that time.

22. The carpentry work done by the claimant was within his capacity as previously represented to this Court. No medical evidence was presented to show any change in his physical capacity or change in his condition, such as surgery, to establish a change in disability.

23. Claimant's date of injury, February 17, 1986, was prior to the enactment of section 39-71-744, MCA (1987) which terminates benefits during incarceration.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Claimant's former counsel, Kurt M. Jackson, was properly dismissed as a party herein.

At trial the State Compensation Insurance Fund limited its requests to only those sums paid the claimant after April 20, 1991. Mr. Jackson's fee was the result of the April 4, 1990 Judgment of this Court. His attorney fees were for services rendered prior to that date. There is no basis for a recovery of attorney fees from Mr. Jackson and he was correctly dismissed.

3. Petitioner, State Fund, has not presented sufficient credible evidence to show a change in claimant's disability since the April 4, 1990 Judgment of this Court awarding permanent partial benefits to the claimant.

Petitioner, State Fund, requests a modification of the previous Judgment in this case based upon section 39-71-2909 (1989), MCA, which follows:

Authority to review, diminish, or increase awards. The judge may, upon the petition of a claimant or an insurer that the disability of the claimant has changed, review, diminish, or increase, in accordance with the law on benefits as set forth in chapter 71 of this title, any benefits previously awarded by the judge.

To obtain a modification of benefits pursuant to section 39-71-2909, MCA (1985) requires credible evidence of a change in disability.

Medical evidence is an essential element of a disability determination, yet petitioner provided no medical examinations or reports to show that claimant's medical condition has changed since the April 4, 1990 Judgment.

In the previous trial, the State Fund did not present any vocational testimony. At the April 1993 trial, State Fund presented vocational witness Anne Arrington, who never saw the claimant. She reviewed the original testimony and claimant's subsequent work record. Ms.

Arrington concluded that the carpentry work done by claimant was not inconsistent with the evidence presented at the first trial.

Claimant is entitled to workers' compensation benefits provided by the statute in effect at the time of the injury. ***Carmichael v. Workers' Compensation Court, 234 Mont. 410, 763 P.2d 1122 (1988)***. At the time of claimant's injury, incarceration was not a bar to receiving permanent partial disability benefits. The petitioner failed to present any evidence which would prove the claimant's disability has changed which would result in modification of this Court's April 4, 1990 Judgment.

4. Petitioner, State Fund, is not entitled to reimbursement of any attorney fees paid by it as a result of this Court's Orders of April 4, 1990 and May 18, 1990.

5. Co-Respondent Kurt M. Jackson is not entitled to additional attorney fees and costs for defense of this action pursuant to section 39-71-612, MCA (1985).

Section 39-71-612, MCA (1985) awards an attorney fee in a controversy where the benefits recovered as a result of the attorney's efforts exceed the amount paid or tendered by the employer or insurer.

Nothing in the statute contemplates payment of an attorney fee for an attorney defending a fee previously awarded.

6. Respondent Henry G. Garcia is not entitled to attorney fees and costs for the defense of this action pursuant to section 39-71-612, MCA (1985).

Likewise, section 39-71-612, MCA (1985) makes no provision for attorney fees for successfully defending a prior award of workers' compensation benefits.

PROPOSED JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant's former counsel, Kurt M. Jackson, was properly dismissed June 28, 1993 as a party herein.

3. Petitioner, State Fund, has not presented sufficient credible evidence to show a change in claimant's disability since the April 4, 1990 Judgment of this Court awarding permanent partial benefits to the claimant.

4. Petitioner is not entitled to reimbursement of any portion of attorney fees paid by it as a result of this Court's Orders of April 4, 1990 and May 18, 1990.

5. Co-Respondent Kurt M. Jackson is not entitled to additional attorney fees and costs for defense of this action pursuant to section 39-71-612, MCA.

6. Respondent Henry G. Garcia is not entitled to attorney fees and costs for the defense of this action pursuant to section 39-71-612, MCA.

7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Proposed Judgment.

DATED in Helena, Montana, this 29th day of November, 1993.

(SEAL)

ROBERT J. CAMPBELL

Hearing Examiner

c: Mr. Charles G. Adams

Mr. Kenneth R. Olson

Mr. Kurt M. Jackson - Courtesy Copy

Submitted: September 9, 1993