

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 26

WCC No. 9709-7824

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W.R. GRACE & COMPANY and  
TRANSPORTATION INSURANCE COMPANY

Petitioners

vs.

KAREN RILEY

Respondent.

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DECLARATORY JUDGMENT

**Summary:** Insurer filed petition for declaratory judgment seeking resolution of the amount of death benefits to which widow was entitled. Prior to his death, the decedent, who suffered from an occupational disease involving exposure to asbestos, had received a lump-sum settlement from the insurer in the amount of \$85,000. The insurer argued it was entitled to recoup this settlement from death benefits owed to decedent's widow. The insurer also sought a social security offset, arguing that if it had been paying decedent bi-weekly benefits, those benefits would have been subject to an offset under section 39-71-702(2), MCA (1985). Respondent disputed the offsets under applicable statutes and also argued that if statutes permitted such offset, they violated constitutional guarantees of due process and equal protection and the full redress provision of the Montana Constitution.

**Held:** Under section 39-72-701, MCA (1985), previously interpreted by this Court in *Manweiler v. The Travelers Ins. Co.*, WCC No. 9511-7445 (6/6/96), the amount and duration of death benefits under the Occupational Disease Act is governed by the death benefits provisions of the Workers' Compensation Act, including section 39-71-721, MCA (1985), which states that where an injured or diseased worker subsequently dies, the beneficiary "is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefits is paid shall be reduced by the period during or for which compensation was paid for the injury." As previously held in *Manweiler*, the insurer is entitled to a credit for any portion of settlement monies paid to decedent which are attributable to periods of time after decedent's death. The fact that decedent herein had entered into a full and final compromise, not merely a lump-sum advance, is not material. Because decedent died 163.42 weeks after the settlement,

section 39-71-721(1), MCA (1985) requires that the portion of the settlement remaining after 163.42 of biweekly benefits must be offset against future death benefits payable to the widow. The statute does not violate equal protection or due process guarantees where it has a rational basis in avoiding duplication of benefits. It does not violate Montana's full redress provision where it involves a statutory entitlement to benefits and does not violate the narrow proscription covered by the provision. The insurer is not, however, entitled to an offset for social security benefits where the amount of death benefits is specified by section 39-71-721(1), MCA (1985), which requires calculation of death benefits "as though the death occurred immediately following the injury," at which point no social security benefits would have been due decedent. Moreover, on its face, the offset applies only to "disability benefits," which death benefits are not.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-721, MCA (1985).** Under section 39-72-701, MCA (1985), previously interpreted by this Court in *Manweiler v. The Travelers Ins. Co.*, WCC No. 9511-7445 (6/6/96), the amount and duration of death benefits under the Occupational Disease Act is governed by the death benefits provisions of the Workers' Compensation Act, including section 39-71-721, MCA (1985), which states that where an injured or diseased worker subsequently dies, the beneficiary "is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefits is paid shall be reduced by the period during or for which compensation was paid for the injury." As previously held in *Manweiler*, the insurer is entitled to a credit for any portion of settlement monies paid to decedent which are attributable to periods of time after decedent's death.

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-701, MCA (1985).** Under section 39-72-701, MCA (1985), previously interpreted by this Court in *Manweiler v. The Travelers Ins. Co.*, WCC No. 9511-7445 (6/6/96), the amount and duration of death benefits under the Occupational Disease Act is governed by the death benefits provisions of the Workers' Compensation Act, including section 39-71-721, MCA (1985), which states that where an injured or diseased worker subsequently dies, the beneficiary "is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefits is paid shall be reduced by the period during or for which compensation was paid for the injury." As previously held in *Manweiler*, the insurer is entitled to a credit for any portion of settlement monies paid to decedent which are attributable to periods of time after decedent's death.

**Constitutions, Statutes, Regulations and Rules: Montana Constitution: Art. II, § 16 (Full Redress).** Section 39-71-721, MCA (1985), which under section 39-72-701,

MCA (1985) applies in an occupational disease case involving death benefits, is not unconstitutional by allowing an insurer to take a credit against future death benefits corresponding to that portion of settlement monies paid to the decedent which are attributable to periods of time after decedent's death. It does not violate Montana's full redress provision where it involves a statutory entitlement to benefits and does not violate the narrow proscription covered by the constitutional provision.

**Benefits: Death Benefits: Offset for Prior Settlement.** Under section 39-72-701, MCA (1985), previously interpreted by this Court in *Manweiler v. The Travelers Ins. Co.*, WCC No. 9511-7445 (6/6/96), the amount and duration of death benefits under the Occupational Disease Act is governed by the death benefits provisions of the Workers' Compensation Act, including section 39-71-721, MCA (1985), which states that where an injured or diseased worker subsequently dies, the beneficiary "is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefits is paid shall be reduced by the period during or for which compensation was paid for the injury." As previously held in *Manweiler*, the insurer is entitled to a credit for any portion of settlement monies paid to decedent which are attributable to periods of time after decedent's death. The fact that decedent herein had entered into a full and final compromise, not merely a lump-sum advance, is not material. Because decedent died 163.42 weeks after the settlement, section 39-71-721(1), MCA (1985) requires that the portion of the settlement remaining after 163.42 of biweekly benefits must be offset against future death benefits payable to the widow.

**Benefits: Social Security Offset: Generally.** Insurer paying death benefits to widow was not entitled to offset those benefits by amount of social security benefits decedent would have received had he survived and been permanently totally disabled.

**Constitutional Law: Equal Protection.** Section 39-71-721, MCA (1985), which under section 39-72-701, MCA (1985) applies in an occupational disease case involving death benefits, is not unconstitutional by allowing an insurer to take a credit against future death benefits corresponding to that portion of settlement monies paid to the decedent which are attributable to periods of time after decedent's death. Workers' Compensation statutes need only be justified with a rational basis, which here exists in that the statute avoids duplication of benefits.

**Constitutional Law: Full Redress.** Section 39-71-721, MCA (1985), which under section 39-72-701, MCA (1985) applies in an occupational disease case involving death benefits, is not unconstitutional by allowing an insurer to take a credit against future death benefits corresponding to that portion of settlement monies paid to the decedent which are attributable to periods of time after decedent's death. It does

not violate Montana's full redress provision where it involves a statutory entitlement to benefits and does not violate the narrow proscription covered by the constitutional provision.

¶1 This matter comes to the Court on a petition for declaratory judgment filed by the insurer, Transportation Insurance Company (Transportation), against the widow (Mrs. Riley) of a deceased worker. Transportation asks the Court to determine the amount of death benefits due Mrs. Riley under the Occupational Disease Act (ODA).

### Facts

¶2 The parties have agreed to the submission of the controversy on an agreed statement of facts. The agreed facts are as follows:

1. Petitioner W.R. Grace & Company (hereafter "Grace"), formerly operated a vermiculite mine near Libby, Lincoln County, Montana. Donald A. Riley worked for Grace at the Libby mine from May 1960 until March 3, 1987. Transportation Insurance company insured Grace for occupational disease purposes during the latter years of Mr. Riley's employment.
2. During the course of his employment for Grace, Mr. Riley contracted asbestosis, an occupational disease. As a result, he submitted a claim to the Division of Workers Compensation for occupational disease benefits. The initial Order of Determination issued by the Montana Department of Labor & Industry on March 24, 1987 held that Mr. Riley was not entitled to occupational disease benefits.
3. Mr. Riley appealed the March 24, 1987 Order of Determination to the Department of Labor & Industry, and following an administrative hearing, the hearing examiner determined that Mr. Riley was permanently totally disabled, that such disability was solely related to his occupational disease, that disability commenced March 4, 1987, and that he was entitled to occupational disease compensation and medical benefits. However, Mr. Riley's attorney's fees and costs incurred in such administrative proceeding were denied. Neither party appealed such decision which was issued in the form of written Findings of Fact, Conclusions of Law and Order dated January 9, 1991, Cause No. 2-82-05400-6.
4. Petitioner and decedent Don Riley entered into a full and final compromise settlement wherein a lump sum payment of \$85,000.00 was paid to Mr. Riley. An order approving such settlement was issued by the Employment Relations Division on December 28, 1993, and \$85,000.00 was paid by petitioner to decedent Don Riley pursuant to that order.
5. Don Riley died on February 26, 1997.

6. Karen Riley, surviving spouse of Don Riley, timely submitted a claim for death benefits and petitioner has initiated payment of benefits at the rate of \$299.00 per week.

7. The death benefits that would have been paid to Karen Riley had the death occurred upon the onset of the disease on March 3, 1987 is \$299.00 per week.

8. Mrs. Riley's date of birth is 06/17/42.

(Agreed Statement of Facts at 1-2.)

¶13 Transportation has also submitted an Affidavit of Patrick Wallace, the adjuster in charge of the case. His affidavit, which is not countered by Mrs. Riley, establishes the following facts:

1. I am the adjuster in charge of the Missoula office of Crawford & Company, which was responsible for claims handling and administration with reference to the occupational disease claim of Donald A. Riley.

2. Prior to his death, based upon his weekly wage at the time of his disability determination, Mr. Riley was entitled to a weekly permanent total disability rate of \$299.00 per week, less a social security offset of \$96.41, resulting in a total weekly entitlement of \$202.59.

3. Given Mr. Riley's date of death, he was entitled to receive occupational disease benefits in the amount of \$202.59 per week for 163.42 weeks, resulting in a total entitlement of \$33,107.25.

4. Mr. Riley was paid a lump sum advance of \$85,000.00 on January 14, 1994. Reduced by the amount he would have received during his lifetime results in an overpayment/recoupment total of \$51,892.75.

5. Based upon actuarial tables, Mrs. Riley had a life expectancy on the date of her husband's death of 25.7 years. Recoupment of the sum of \$51,892.75 over a period of 25.7 years results in a weekly reduction of \$38.72.

6. Attached hereto as Exhibit A is a copy of the Order Approving the Full and Final Compromise Settlement of Mr. Riley's occupational disease claim.

(Affidavit of Patrick Wallace at 1-2.)

¶14 For purposes of this decision, the Court assumes the facts set forth in the Affidavit of Patrick Wallace are true, especially since Mrs. Riley has not replied to them. However, the use of the affidavit is unusual. The case was not submitted on a motion for summary judgment but rather on an Agreed Statement of Facts. The facts set forth in the Affidavit of Patrick Wallace are not part of the Agreed Statement of Facts. Under summary judgment

procedures, Mrs. Riley would be obligated to reply to the affidavit if she disputed the facts therein. Under the procedure followed in this case, however, such obligation is far from clear.

¶15 Rather than ignore the affidavit or send the matter back to the parties for more information, the Court will assume the facts set forth in the affidavit with the proviso that within 20 days of its decision, Mrs. Riley may notify the Court as to any parts of the affidavit she disputes. If she does so, and the disputes are material, the Court will set the matter for trial with respect to the controverted matters. If the facts of the affidavit are not disputed, then the Court will certify its decision and judgment as final upon expiration of the 20-day period.

### Issues

¶16 The parties have stated the issues in their respective briefs, each phrased somewhat differently, but presenting the same questions. The Court restates the issues as follows:

1. Whether Transportation Insurance Company is entitled to recoup or offset any portion of the lump-sum settlement it paid to Mr. Riley prior to his death.
2. If so, is Transportation entitled to take a social security offset in determining its liability to Mrs. Riley.

### Discussion

¶17 The issues, while stated simply, involve complex matters of statutory interpretation, as well as consideration of Mrs. Riley's constitutional challenges to the statutes if the Court fails to construe them as she argues.

#### A. Applicability of section 39-71-721, MCA (1985).

¶18 The statutes applicable to this controversy are those in effect on the date Mr. Riley's claim arose. *Manweiler v. The Travelers Ins. Co.*, WCC No. 9511-7445, Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Summary Judgment Motion (June 6, 1996), at 6 (hereinafter *Manweiler*). Mr. Riley filed his claim for compensation at least by March 24, 1987. Thus, the Court will apply the 1985 law, which was in effect on that date.

¶19 The same 1985 statute was at issue in *Manweiler*, therefore this Court's interpretation of the statute applies. The statute in question is section 39-72-701, MCA (1985). It reads in relevant part:

- (1) The compensation to which . . . the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, are entitled under this chapter shall be the same payments which are payable to **an injured employee**, and such payments shall be made for **the**

**same period of time as is provided** in cases of temporary total disability, permanent total disability, and **in cases of injuries causing death under the Workers' Compensation Act.** [Emphasis added.]

As found in *Manweiler*, the section expressly provides that "the amount and duration of death benefits under the ODA is governed by the death benefits provisions of the WCA." *Manweiler* at 6.

¶10 The payment of death benefits is further governed by section 39-71-721, MCA (1985), which provides:

(1) If an injured employee dies and the injury was the proximate cause of such death, then the beneficiary of the deceased, as the case may be, is entitled to the same compensation as though the death occurred immediately following the injury, but the period during which the death benefit is paid **shall be reduced by the period during or for which compensation was paid for the injury.**

(2) To beneficiaries as defined in subsections (2)(a) through (2)(d) of 39-71-116, weekly compensation benefits for injury causing death are computed at 66% of the decedent's wages. The maximum weekly compensation benefits may not exceed the state's average weekly wage. The minimum weekly compensation for death is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of his death. [Emphasis added.]

The effect of this section was also considered in *Manweiler*. In that case, the deceased, prior to this death, and the insurer entered into a full and final compromise settlement of his claim providing for a \$30,000 lump-sum payment to the deceased. I held that the payment had to be taken into consideration in determining the benefits due the deceased's beneficiaries:

As quoted earlier, [§ 39-71-721(2) MCA (1985)] provides for a reduction in death benefits "by the period during or *for which* compensation was paid for the injury." Since the ODA incorporates the WCA provisions governing period of time for payment of death benefits, this language applies to ODA death benefits. The language contemplates lump-sum advances to the injured worker since it provides not only for a reduction due to benefits paid "during the period" but also for a reduction for periods "for which" benefits were paid. The "for which" language was plainly intended to cover future periods for which prospective benefits are advanced to the worker. It thereby protects the insurer from duplicate payments when lump summing occurs, as it did in this case.

(*Id.* at 10.) The cite is actually to subsection (2) of section 39-71-721, MCA, which is erroneous. The citation should have been to subsection (1).

¶11 In *Manweiler*, I held that in paying death benefits to beneficiaries, the insurer is entitled to a credit for "any portion of settlement monies paid to decedent [which] are attributable to periods of time after decedent's death." (*Id.*)

¶12 Mrs. Riley argues that section 39-71-721(1), MCA, is inapplicable because the settlement between her deceased husband and Transportation was on a full and final compromise, and did not constitute a lump-sum advance. The argument is unpersuasive. The section does not distinguish between types of settlements or between settlements and advances. It provides only that "the period during which the death benefit is paid shall be reduced by the period during or for which compensation was paid for the injury." (Emphasis added.) The "for which" language covers lump sums which are greater than the amount to which the claimant would have been entitled in biweekly benefits prior to his death. There is no other reasonable explanation for the insertion of the "for which" language into the section. Benefits paid on a biweekly basis are covered by the preceding language which states that death benefits are to be reduced "by the period during . . . which compensation was paid."

¶13 As shown by the Affidavit of Patrick Wallace, the amount of the settlement in this case equaled biweekly amounts which would have been payable over 419.57 weeks (\$85,000 divided by \$202.59) if the social security offset is considered, or 284.28 weeks (\$85,000 divided by \$299.00) if it is not. Mr. Riley died 163.42 weeks after the settlement. Thus, section 39-71-721(1), MCA (1985), requires that the portion of the settlement remaining after 163.42 weeks of biweekly benefits must be offset against future death benefits.

## II. Constitutional Contentions.

¶14 Mrs. Riley further argues that if there is a statutory offset, then the statute is unconstitutional. She says the following constitutional rights are violated: The full redress provision of Article II, § 16, 1972 Montana Constitution; the equal protection clauses of the United States and Montana State Constitutions; the due process clauses of the United States and Montana State Constitutions. The challenges are considered in reverse order.

¶15 Mrs. Riley cites two cases in support of her due process argument. *Mitchell v. Banking Corp. of Montana*, 94 Mont. 183, 22 P.2d 155 (1933); *Baptist Medical Center v. Transcon Lines*, 852 P.2d 139 (Okla. 1993). Those cases, however, concern the effect of a judgment on persons who were not parties to the action in which the judgments were entered. The limitation on benefits in this case does not arise from any judgment, rather it arises from the plain language of the statute which fixes the benefits.

¶16 Her equal protection argument is similarly in error. In matters involving workers' compensation, the statute need only have a rational basis. *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 430, 938 P.2d 658, 662 (1997). A rational basis for section 39-71-721(1), MCA (1985), is readily apparent. By requiring an offset, the statute avoids

duplication for benefits which would arise if there were no offset. Second, it reflects the fact that the beneficiaries may already have benefitted, at least indirectly, from the prior payment of benefits to the decedent by enabling the decedent to discharge his family financial obligations while still alive, and, perhaps, even leave a residual estate in the event of premature death. Thirdly, the constitutional guarantee of equal protection requires only that "all persons to be treated alike under like circumstances." *White v. State*, 203 Mont. 363, 368, 661 P.2d 1272, 1274 (1983). The injured worker and his beneficiaries do not suffer the same damage from an industrial accident; the injuries to beneficiaries are non-physical and indirect, stemming from a loss of financial support and intangible factors.

¶17 Finally, section 39-71-721(1), MCA (1985), does not violate the full redress provision.

**The administration of justice.** Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

Mt. Const. of 1889, art. II, § 16. The section makes a specific exception for injuries arising out of employment where workers' compensation insurance coverage is afforded. Mrs. Riley's citation to *Brander v. Travelers Ins. Co.*, 179 Mont. 208, 587 P.2d 933 (1978) and *Francetich v. State Compensation Mutual Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992), do not support her contention that she has been denied full redress. Those cases concerned the right to full redress against third parties, not employers and workers' compensation insurers. As the Supreme Court noted in *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 36, 776 P.2d 488, 497 (1981), "[T]he delegates narrowly drafted the [full redress] amendment to accomplish the single purpose of limiting the lawmakers' power in restricting third party actions in workers' compensation law." Moreover, even as to third-party actions, the right to full redress does not guarantee any particular cause of action; thus the legislature may alter common-law causes of action, remedies, and redress, without demonstrating that a compelling state interest justifies classifications created by such modifications. *Johnson v. State*, 238 Mont. 215, 216, 776 P.2d 1221, 1222 (1989) (citing *Meech*). U.S. Const., amend. XIV, § I; MT Const. of 1889, art. II, § 4.

### III. Social Security Offset

¶18 During his lifetime, Mr. Riley's biweekly rate was subject to the social security offset, § 39-71-702(2), MCA (1985), which provides:

**39-71-701. Compensation for injuries producing total permanent disability.** (1) Weekly compensation benefits for injury producing total temporary disability shall

be 66% of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed \$110 beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total temporary disability benefits shall be paid for the duration of the worker's temporary disability.

(2) 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 the 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 facts provided by the parties show that from 1993 to his death, Mr. Riley received social security disability benefits on account of his occupational disease. Under the plain language of the section, his weekly workers' compensation rate was reduced by one-half the amount of the disability benefit.

¶19 Section 39-71-721(1), MCA, allows a reduction "by the period during or for which compensation was paid." The period for which compensation was paid during his lifetime must use his benefit rate as prescribed by statute. Since section 39-71-702(2), MCA (1985), fixed his benefit rate after taking the social security offset into account, the social security offset must be considered in determining the number of weeks of benefits Mr. Riley received prior to his death and the total amount of those benefits.

¶20 However, a social security offset may not be taken in computing Mrs. Riley's benefits. As set out earlier, the amount of death benefits is governed by section 39-71-721(1), MCA (1985). That section provides that the amount must be calculated "as though the death occurred immediately following the injury." Such calculation leaves no room for any social security offset, which would arise only if death did not immediately occur and there was a period of disability. Moreover, on its face, the social security offset applies only to "disability benefits." Traveler's argues that the widow's benefits Mrs. Riley may be receiving from social security are "in essence" disability benefits. *Essence* does not cut it. They have to *in fact* be disability benefits within the meaning of the statute. Transportation does not contend that they are. Therefore, Mrs. Riley's biweekly rate is the full \$299.00.

#### IV. Amounts Due

¶21 Mr. Riley's weekly rate after the social security offset was \$202.59. He lived for 163.42 weeks following his settlement with Transportation. Thus, the total amount of benefits attributable to the period preceding his death is \$33,107.26 (*\$202.59 times 163.42 weeks.*) Accordingly, Transportation is entitled to a total offset of \$51,892.75 against future benefits otherwise due Mrs. Riley.

¶22 As of the date of her husband's death, Mrs. Riley's life expectancy was 25.7 years. That amounts to 1,340 weeks based on a 52.14 week year. Dividing the total weeks of her prospective benefits into the offset, Transportation is entitled to a weekly offset of \$38.72.

¶23 Since Mrs. Riley's weekly rate is \$299.00, her net weekly rate after the offset is \$260.28. That is the rate that shall apply to benefits paid hereafter.

¶24 Transportation has paid Mrs. Riley the full \$299.00 since her husband's death. For those past payments, it wishes to recover the difference between the \$299.00 and \$260.28. However, there is no agreed fact showing that Transportation's payments have been made under any reservation of rights. Lacking such indication, the Court will not address the matter.

### JUDGMENT

¶25 1. From the date of the entry of this judgment, Transportation Insurance Company shall pay respondent, Karen Riley, the amount of \$260.28 a week so long as she qualifies for the death benefits provided under the Montana Occupational Disease Act. Such amount shall be paid on a biweekly basis.

¶26 2. Within 20 days of this decision and judgment, respondent, Karen Riley, shall notify the Court in writing as to any parts of the Affidavit of Patrick Wallace she disputes. If she does so, and the disputes are material, the Court will set the matter for trial with respect to the controverted matters. If the facts of the affidavit are not disputed, then the Court will certify its decision and judgment as final upon expiration of the 20-day period.

¶27 3. Any party to this dispute may have 20 days in which to request a rehearing from this Declaratory Judgment.

DATED in Helena, Montana, this 23rd day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas R. Bostock

Mr. Allan M. McGarvey

Date Submitted: November 20, 1997