IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 55

WCC No. 2001-0450

EDWIN KENDALL

Petitioner

vs.

ST. REGIS PAPER COMPANY

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Permanently totally disabled claimant, who had received two prior lump-sum advances and been admonished by the Court in connection with the second one to reform his spending habits, petitioned for a lump-sum conversion of his remaining future benefits. His request was based on tens of thousands of dollars of indebtedness incurred in large part on account of unnecessary expenditures and giving money to his adult children, the very sort of expenditures previously condemned by the Court.

Held: The lump-sum request is denied since claimant's current income is sufficient to meet his expenses and service his debt and it is likely that if a lump sum were awarded the claimant would continue his irresponsible expenditures, leading to financial disaster in the future.

Topics:

> **Benefits: Lump Sums: Best Interests.** Where the claimant has received two prior lump-sum advances on account of indebtedness incurred primarily because of irresponsible expenditures on behalf of adult children and unnecessary purchases; where he now applies for a lump-sum conversion after running up debts in excess of $100,000 in large part due to similar irresponsible expenditures; and where his average monthly family income exceeds his regular, necessary monthly expenses and debt service, the lump-sum request is denied since it is unnecessary and since it would lead to further irresponsible spending and ultimately to financial disaster.

¶1 The trial in this matter was held in Missoula, Montana on June 26, 2002. Edwin Kendall (claimant), was present and represented by Ms. Laurie Wallace. Respondent, St. Regis

Paper Company (St. Regis), was represented by Mr. Kelly M. Wills and Ms. Kathleen L. DeSoto.

¶2 Exhibits: Exhibits 1 through 5 were admitted without objection. Exhibits 6 through 15 are in the nature of summaries of financial information and were admitted for demonstrative purposes only.

¶3 Witnesses and Deposition: Claimant and Audrey Kramer testified. The parties submitted the deposition of Edwin Kendall for the Court's consideration.

¶4 Issues Presented: Claimant is requesting a lump-sum of $158,000. (See Ex. 1.) He also seeks attorney fees and a penalty.

¶5 Bench Ruling: Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court ruled from the bench, denying the lump-sum request in its entirety. The denial was without prejudice to claimant requesting a partial lump-sum advance after he obtains debt counseling and establishes a sound financial plan.

¶6 The following findings of fact, conclusions of law and judgment reiterate and elaborate upon the Court's oral bench ruling.

FINDINGS OF FACT

¶7 The claimant suffered an industrial injury on September 13, 1980, while working for St. Regis in Libby, Montana. (Uncontested Fact 1.)

¶8 At the time of his injury, St. Regis was self-insured under Plan 1 of the Workers' Compensation Act. (Uncontested Fact 2.) St. Regis accepted liability for the injury.

¶9 Claimant was unable to return to work and was determined to be permanently totally disabled. St. Regis has been paying him permanent total disability benefits. (Uncontested Fact 3.)

¶10 In 1987 the claimant requested and received a $35,000.00 lump-sum advance of future permanent total disability benefits. The advance was based on an affidavit in which claimant listed outstanding debts of $28,054.02. The affidavit stated that the $35,000.00 would allow claimant to pay off his debts and make home repairs, and would leave him debt free and able to provide for his family with his current income. (Ex. 4.)

¶11 On October 24, 1991, claimant filed a petition with this Court seeking an additional lump-sum advance of $54,746.49. *Kendall v. St. Regis Corp.,* WCC No. 9110-6288. In answer to interrogatories, claimant listed outstanding debts of $43,622.67. (Ex. 3 at 00012.)

¶12 After trial this Court awarded claimant a $21,149 lump-sum advance but found as a matter of fact that the claimant was fiscally irresponsible and warned him to get his

financial affairs in order. Parts of the prior decision merit repeating. The following paragraphs are from the Court's findings of facts:

> In approximately four years, claimant has gone from being debt free to having over $44,000 in debts. He has mortgaged his home, grossly mismanaged his credit card debt and purchased items which are worthwhile but not within his means. They include two new cars, including a graduation gift for his daughter, furniture for his recently married daughter, a $2,000 computer, installation of a $3,000 garden, lawn mower, lawn sweepers, a four-wheel drive all terrain vehicle, paid for his daughter's wedding, a new stereo, new vacuum and multiple cash gifts to his daughters as well as college tuition payments financed by loans.
>
> The purchases are not frivolous, but they demonstrate the claimant's inability to realistically balance his income and expenses.
>
> The claimant is credible but impresses the Court as a man who is simply unwilling, or perhaps unable, to deny his children anything, a meritorious thought but not realistic given his financial circumstances.

(Findings of Fact and Conclusions of Law and Judgment (July 21, 1992) at 6). In its conclusions of law the Court went on to say:

> Determining what is "best interest" is seldom easy. In the instant case, claimant has demonstrated virtually no self-control in managing his finances. Though essentially debt free in 1987, he is now over $40,000.00 in debt, nearly all due to his admirable but imprudent devotion to his children and expenses needlessly incurred given his limited income. The purchase of an all terrain vehicle to help him get around is not wasteful but not necessary. Purchasing a brand new car for his college-bound daughter is wonderful but well beyond his means.

(*Id*. at 7.)

¶13 The evidence in the present case shows a pattern of spending and lack of fiscal responsibility similar to that censured by the Court in 1992. Claimant now lists debts totaling $106,566.00. (Ex. 2 at 2.) Of that amount, $56,968.65 is in credit card debt, while the remainder is primarily on account of purchase of a 2000 Dodge Stratus and loans taken out against his home.

¶14 One of the significant expenditures driving his indebtedness is a 30' x 28' garage with two attached 12' open stalls which claimant built over the past few years. He built it for storage and so he could "work on cars." (Trial Test.; Kendall Dep. at 21.) Over the years he has purchased a number of old cars and done some restoration of them, but he has never fully restored a car and his expenditures for old cars has exceeded his income from reselling him. At present he has numerous old cars on his property and his restoration of

cars can best be characterized as a money losing hobby. The garage is most certainly an extravagance which claimant could ill-afford.

¶15 Another significant, recent personal expenditure was a new car. In 2000 or 2001, the claimant purchased a 2000 Dodge Stratus for $18,000 ($16,000 after trade-in of a 1996 Plymouth Breeze). He still owes in excess of $14,000 on the car loan. (Trial Test.; Ex. 2 at 1.)

¶16 Claimant has recently fenced his property. (Kendall Dep. at 89.) The necessity for fencing is not apparent to the Court.

¶17 Other recent personal expenditures which are either extravagant or which appear unnecessary are:

- $600.00 for a Kirby vacuum cleaner (Kendall Dep. at 114.)
- $519.12 expended in 1998 to convert a trailer frame into a flatbed trailer. (*Id*. at 125.)
- $500.00 for a riding lawnmower. (*Id*. at 140.)
- $125.00 to $232.00 monthly for non-prescribed vitamins and supplements, of which approximately one half is recovered by claimant's wife through resale of some of the products. (Trial Test.) The purchases have been charged to claimant's credit cards. (*Id*.)
- Various tools for hobby work on cars, including a $765.00 air compressor purchased six weeks before his March 26, 2002 deposition; a rechargeable drill and a $45.00 welder for welding on cars; air body tool, hand tools, sanders, grinders, and cut off saw, purchased over the three years prior to his deposition; and metric hand tools purchased for $100.00 one week before his deposition. (Kendall Dep. at 33-34, 63, 64, 147-48.)
- Several old cars purchased with the intent of restoring, including two Pontiacs, a Chevy S-10 pickup which he bought and sold, and an International Scout, for which he paid around $4,000.00 several years ago (Trial Test.; Kendall Dep. at 43.)

¶18 Claimant's monthly phone bill has until recently averaged $115 monthly. He has recently changed carriers and reduced his monthly charges to $80. He has maintained an "800" number for his children, thus is paying for their calls home, as well as his and his wife's calls to them.

¶19 As in the past, since 1992 the claimant has continued to expend significant sums of money on his five children, who are all adults. His various expenditures for items given to his son include:

- $3,000.00 for a Nissan pickup. (Kendall Dep. at 96.)

- $2,200.00 for a 1988 Ford Taurus, although part of that amount has been repaid by the son.
- $350.00 for a car that only lasted a month.
- $350.00 for a washing machine. (*Id.* at 8-9.)
- $122.77 for an alternator for his son's car. (*Id.* at 60.)
- $660.74 for a transmission for his son's car. (*Id.* at 70.)
- $100.00 in repairs to his son's car. (*Id.* at 90.)
- $1,200.00 for a tractor. (*Id.* at 8-9, 62.)
- $1,425.00 for a wood stove, **purchased after the filing of the petition**. (*Id.* at 45.)
- $1200.00 and $800.00 for two other, previous wood stoves. Claimant resold one for $500.00 and traded the other for $350.00 of wood, thus realizing a loss of $1,150.00. (Trial Test.; Kendall Dep. at 131-32.)
- $200.00 for a washing machine and dryer, the washing machine being replaced by a newer $350.00 model noted earlier. (Kendall Dep. at 109.)
- $900.00 for an 1986 Nissan Sentra. (*Id.* at 112-13.)
- $50.00 for a refrigerator. (*Id.* at 110.)
- $70.00 for replacement of a Nissan car window. (*Id.* at 114.)
- $40.00 for tax preparation. (*Id.* at 123.)
- $456.00 for hay for his son's horses. (*Id.* at 130.) (According to claimant's trial testimony, another $950.00 outlay for hay for his son's horses was recently repaid.)
- $100.00 for phone bill. (*Id.* at 133.)
- $68.38 for license plates for a 1986 Nissan. (*Id.* at 138-39.)
- $6,000.00 for a 5th wheeler his son lived in while attending college, of which $5,00.00 was recouped upon resale. (Trial Test; *Id.* at 79.)
- $800.00 (minimum) paid between 1996 and 2000 for work on his son's house, not including meals and for workers helping with the house. (Trial Test.)
- $865.99 for a well drilled on his son's property. (Kendall Dep. at 72.)
- $1,500.00 minimum in gifts. (Trial Test.)
- $200.00 in loans in 2000. (Kendall Dep. at 131.)
- Unknown amount for one semester of college. (*Id.* at 154.)
- $129.20 for his son's pickup insurance. (*Id.* at 138.)

Since 1992, claimant has also continued to assist his adult daughters:

- He assisted two of his daughters with college expenses but does not know how much he spent. (*Id.* at 155.) While they were in college he also helped each of them with the purchase of a trailer home, co-signing notes and making some of the loan payments on the homes. (*Id.* at 156.) He testified that he made approximately one-half of the payments for one of the daughters. (*Id.*)

- In 1996 he paid $218.45 for auto insurance for his daughter Marty. (*Id.* at 138.)

- In 1997 he paid $145.00 on daughter Marty's credit card. (*Id*.)
- In 1998 he paid $173.00 for his daughter Marty's auto insurance. (*Id*. at 115.)
- In 1998 he paid $100.00 on his daughter Marty's Visa bill. (*Id*. at 116.)
- He testified that since 1996 he has given his daughter Marty $1,500.00. (Trial Test.)

¶20 In addition claimant co-signed for a car loan for a daughter and makes occasional payments on account of the loan. (Kendall Dep. at 10-12, 50.) He has also co-signed loans to other of his children for car loans, some of which are still outstanding. (*Id*. at 30.) In 1998 and 1999 he also co-signed bank loans totaling $32,000 for his son's home. (*Id*. at 68-69.)

¶21 Claimant also maintains a life insurance policy for one of his daughters. In 2000 he paid $150 for the premium. (*Id*. at 134.)

¶22 Claimant financed many of his purchases through loans, credit card charges, and credit card cash advances.

¶23 Claimant's monthly income from his workers' compensation benefits, a pension, and social security is $1,699.78. In addition, his wife works. At the time of his deposition she was earning $838.00 monthly, thus total family income was $2,537.78 at that time. (Ex. 2 at 00300.)

¶24 Claimant's wife works three different jobs: (1) providing home care through a company known as Intrepid, (2) taking groceries to home bound individuals, and (3) cleaning a post office. At the time of claimant's deposition, she was working only 6 hours a week at $7.75 an hour for Intrepid, however, at trial claimant testified that 6 hours a week was unusually low and was due to the deaths of some of her clients. At the time of trial, she was working 32 hours a week for Intrepid. Thus, her earnings at the time of trial were $1,802.30, yielding a family monthly income of $3,502.02. However, claimant testified that on average his wife only works 15 to 18 hours weekly for Intrepid. Using those hours, on an average monthly basis she earns on an average monthly basis between $1,229.85 (based on 15 hours) and $1,331.22 (based on 18 hours). Based on these earnings, the average monthly family income is between $2,929.64 and $3,030.94.

¶25 Claimant's monthly expenditures, including debt service, are $3,116.81. (Ex. 2 at 00300.

¶26 Claimant has not sought credit counseling, although at trial he indicated he is now willing to do so.

¶27 Audrey Kramer, a certified consumer credit counselor, reviewed the claimant's financial situation and testified that with assistance of a credit counselor, reduction of expenses and negotiation with credit card companies, the claimant can reduce his monthly expenditures, including debt service. Her initial report, found at Exhibit 5,

indicated claimant could reduce his monthly expenditures from $3,116.81 (ex. 2 at 00300) to $2,626.77 ($1,776.77 in monthly expenses plus $850.00 in debt service), leaving a shortfall of $338.99. However, in her report Ms. Kramer recorded family income as $2,287.78, which is $250.00 less than reported by claimant at the time of his deposition, and omitted one credit card balance which claimant is paying off at $186 monthly. With these changes, and assuming time-of-deposition income, claimant's monthly shortfall with a debt management plan would be $324.00 monthly. However, the time-of-deposition income understates the claimant's family income by between $391.86 and $493.16, which means that with a debt management plan the claimant can meet his monthly expenses and debts with his average current income. Indeed, at the time of trial his family **income exceeded monthly expenses and debt payments by $385.21 without a debt management plan in place**.

¶28 I find and conclude that with a debt management plan the claimant will be able to meet his monthly expenses and service his debts. Of course, that means he must stop providing support to his adult children and stop unnecessary expenses and hobbies.

¶29 Claimant provided a standard mortality table showing life expectancy for individuals his age, however, claimant suffers from diabetes and congestive heart failure. His doctor has indicated that he has a shorter life expectancy than normal for a person his age but has not indicated what his life expectancy is.

¶30 Claimant requests a lump summing of all future benefits in the amount of $158,000.00 (ex. 1 at 1), which would leave him with $51,424.00 in cash even after he paid off those debts. I am persuaded that the excess would be expended in a short time on his children and on unnecessary purchases.

¶31 I find that a lump-sum conversion or advance is not in the clamant's best interest. He was admonished in 1992 to get his finances under control and stop supporting his children. He failed to do so. I am convinced that if a lump-sum advance is made that he will continue to give money to his children, make purchases which are unnecessary given his income, and quickly run up additional debt. The next time around, however, there will be no fund to bail him out. The only hope for claimant to get his expenses and debt under control is to force him to do so, and the only way to do that is to deny the request and make him confront his present financial situation. Given his average family income, he can meet his monthly expenses and make his monthly debt payments but he will have to forego further gifting to his children, further extravagant purchases such as the $600 Kirby vacuum, and money losing hobbies.

CONCLUSIONS OF LAW

¶32 This case is governed by the 1979 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶33 On the date of the claimant's injury, lump summing was governed by section 39-71-741, MCA (1979), which provided in relevant part:

> The biweekly payments provided for in this chapter may be converted, in whole or in part, into a lump-sum payment. Such conversion can only be made upon the written application of the injured worker or the worker's beneficiary and shall rest in the discretion of the division, both as to the amount of such lump-sum payment and the advisability of such conversion. The division is hereby vested with full power, authority, and jurisdiction to compromise claims and to approve compromises of claims under this chapter. All settlements and compromises of compensation provided in this chapter are void without the approval of the division. . . .

Under the section, a lump sum is available where "outstanding indebtedness exists, a pressing need is shown, or the best interests of the claimant, his family and the general public will be served." *Stanley Structures v. Scribner,* 253 Mont. 236, 240, 833 P.2d 166, 169 (1992).

¶34 Nonetheless, even under 1979 law a lump-sum conversion is not a matter of right. *Sullivan v. Aetna Life & Casualty,* 271 Mont. 12, 18, 894 P.2d 278, 281-82 (1995). The rule is still "that lump sum advances are the exception and are available only upon a showing, the claimant, that such an advance is in the best interests of the claimant." Claimant bears the burden of proving by a preponderance of the evidence that a lump sum is in his best interest. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶35 The claimant must learn to live within his means. It seems that the prior lump sums have discouraged him from doing so. Despite the admonition of this Court in 1992, he continued his unrestrained spending. To now grant his request for a lump-sum conversion of all future benefits would not only make a mockery of the Court's prior admonitions but, in the end, will lead to financial disaster for claimant since he will not change his spending habits.

¶36 Claimant's current family income is sufficient to meet his expenditures and pay his debts. He has failed to prove by a preponderance of the evidence that a lump-sum conversion or advance is necessary or that he would be better off with it. As I indicated earlier, he is more likely to bring his expenditures into line with his income if his lump-sum request is denied and he is forced to curtail his expenditures and establish a debt management plan. Claimant has not shown that a lump sum is in his best interest.

¶37 Moreover, even if claimant were entitled to an advance to pay indebtedness, he would not be entitled to money in excess of indebtedness. Investment is not a legitimate reason for lump summing. *LaVe v. School Dist. No. 2,* 220 Mont. 52, 55, 713 P.2d 546, 548 (1986).

¶38 A final note: Claimant provided a life expectancy table but his own testimony indicates that the table does not apply to him because his medical conditions decrease his life expectancy in comparison to the normal average. Therefore, it is impossible to calculate the amount of a lump-sum conversion even if clamant were entitled to the conversion.

JUDGMENT

¶39 Claimant's request for a lump-sum conversion of future permanent total disability benefits is **denied**. His petition is **dismissed** but without prejudice to his seeking a modest lump-sum advance to assist him if he establishes a reasonable debt management plan and such advance is necessary for him to embark on that plan.

¶40 Claimant is not entitled to costs or attorney fees since he has not prevailed.

¶41 This JUDGMENT is certified as final for all purposes.

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

DATED in Helena, Montana, this 6th day of November, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Kelly M. Wills
Ms. Kathleen L. DeSoto
Submitted: June 26, 2002