IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 49

WCC No. 2002-0624

TRINA L. KESSEL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

PRESTIGE ASSISTED LIVING AT BUTTE

Employer.

ORDER DENYING PARTIAL SUMMARY JUDGMENT

Summary: Claimant who suffered an industrial injury but is ineligible for permanent partial disability benefits because she has no impairment requests benefits under section 39-72-405, MCA, of the Occupational Disease Act. Respondent moved for partial summary judgment since the section applies only to claimants suffering occupational diseases. Claimant argues, however, that under the *Henry, Schmill,* and *Stavenjord* decisions, the limitation of -405 benefits to OD claimants should be declared unconstitutional.

Held: Consideration of the constitutional issue is required in order to decide the motion for partial summary judgment. However, since claimant is also claiming to be temporary totally disabled and has not established as a matter of fact that she suffered a wage loss and otherwise meets the criteria for an award under section 39-72-405, MCA, consideration of the constitutional issue is premature and the motion for summary judgment must be denied without prejudice.

Topics:

> **Constitutional Challenges: Non-constitutional Grounds For Decision.** Where a case may be disposed of on non-constitutional grounds, the Court should not address a constitutional challenge. Thus, until the non-constitutional grounds are decided, consideration of the constitutional challenge is premature.

¶1 The petitioner (claimant) is seeking temporary total disability benefits on account of a work-related shoulder injury she suffered on October 23, 1999. In the alternative she seeks

an award of benefits under section 39-72-405, MCA (1999), of the Occupational Disease Act, urging that despite a 0% impairment she is unable to return to her time-of-injury job and suffers a wage loss which would entitle her to an award under the section if it is applied to her.

¶2 Respondent moves for partial summary judgment with respect to the section 39-72-405, MCA, claim, arguing quite appropriately that the section does not apply to claimant since she suffered an injury, not an occupational disease. Citing *Henry v. State Compensation Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456, and this Court's decisions in *Schmill v. Liberty Northwest Insurance Corp.,* 2001 MTWCC 36 and *Stavenjord v. State Compensation Insurance Fund,* 2001 MTWCC 25, claimant counters that a failure to allow her benefits under section 39-72-405, MCA, violates her constitutional rights. She notes, "While the WCA [Workers' Compensation Act] typically provides greater benefits than the ODA [Occupational Disease Act] with respect to wage loss, in this case, the converse is true."

¶3 The Court cannot grant partial summary judgment unless it addresses the constitutional challenge. However, it is not at all clear that the constitutional issue will ever have to be addressed. Initially, the claimant is seeking temporary total disability benefits. If her request is granted, her entitlement, if any, under section 39-72-405, MCA, is premature. Further, under section 39-72-405, MCA, she must establish a wage loss and meet other criteria, which she has not done as of this time. The section provides:

> **39-72-405. General limitations on payment of compensation.** When an employee has an occupational disease incurred in and caused by the employment that is not yet disabling and is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is medically inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding $10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.

¶4 In *Weatherwax v. State Compensation Insurance Fund,* 1999 MTWCC 68, I declined to rule on a summary judgment motion challenging the constitutionality of denying permanent partial disability benefits to a claimant suffering from an occupational disease because the claimant had failed to establish that he was otherwise entitled to permanent partial disability benefits. I noted the rule that a court should not rule on a constitutional challenge where the case can be decided without reaching that issue. *In re Gildersleeve*, 283 Mont. 479, 485, 942 P.2d 705, 709 (1997). Lacking a determination regarding temporary total disability and proof that claimant meets the criteria for an award under section 39-72-

405, MCA, other than the requirement that she suffer from an occupational disease, consideration of the constitutional issue raised in this case is premature.

ORDER

¶5 Therefore, the motion for partial summary judgment is **denied** as premature and without prejudice.

DATED in Helena, Montana, this 17th day of October, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. William Dean Blackaby
Mr. Larry W. Jones
Submitted: October 7, 2002