IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9212-6666

BRIAN WRAY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HARP LINE CONSTRUCTION COMPANY

Employer.

ORDER AMENDING JUDGMENT

On October 26, 1993, the Court adopted the FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED JUDGMENT of its hearing examiner. Within the 20 days allowed for the filing of a request for rehearing or to amend, ARM 24.5.244, the petitioner filed a MOTION FOR REHEARING OR TO AMEND JUDGMENT. Additionally, he filed a MOTION TO AMEND PRETRIAL ORDER in which he seeks to restate the issue presented for trial. Both motions have been briefed and are ready for decision.

1. Motion For Rehearing Or To Amend Judgment

In his first motion the petitioner seeks two things. First, he requests the Court to strike those portions of the findings, conclusions and judgment which relate to an $11,029.52 overpayment of benefits which resulted from petitioner's receipt of auxiliary social security benefits. Second, he requests that a portion of paragraph 10 of the findings be stricken because it is contrary to the evidence. Petitioner also requests a new trial.

The matter of recouping $11,029.52 arose at the time of trial when petitioner disclosed that he had received previously undisclosed auxiliary social security benefits. The hearing examiner's decision fixed the amount of the resulting overpayment at $11,029.52, and authorized the respondent, State Compensation Insurance Fund (State Fund), to offset petitioner's biweekly benefits by an additional $17.32 to recoup the overpayment.

Petitioner argues that the hearing examiner's action was outside of the issues presented for trial. He also points out that the specific amount of overpayment determined by the hearing examiner is not supported by the evidence. He is correct on both points.

Petitioner initiated this action to restore his full biweekly benefits. At the time of the filing of the petition, the State Fund was offsetting his benefits to recoup previous lump sum advances and a known social security overpayment, which is not at issue here. The State Fund opposed the petition, defending its offsets. It did not counter-petition for an order allowing it to take an additional offset.

The State Fund agrees that the evidence presented at trial does not support the hearing examiner's $11,029.52 calculation but argues that the amount can be derived by judicially noticing regulations of the Social Security Administration. Based on those regulations, it argues that the calculated amount is correct.

It was error to include this matter in the original decision. The matter was outside the scope of the issues presented by the Petition and Pretrial Order, and respondent did not seek affirmative relief by way of a counter-petition. The evidence also failed to support the amount determined by the hearing examiner. It would be inappropriate at this late stage of the case to now take judicial notice of administrative regulations in an attempt to justify the hearing examiner's computation. Moreover, the State Fund will not be prejudiced by excision of the matter from the decision. Petitioner does not dispute the State Fund's entitlement to an offset, and the State Fund does not need Court approval to take the offset. The State Fund can also readily obtain the information necessary to exactly calculate the amount of the overpayment. Therefore, those portions of the original decision which concern the matter will be deleted.

Petitioner's second argument concerns paragraph 10 of the findings of fact. That paragraph reads:

10. When claimant petitioned for the first three lump sum advances he understood from his lawyer that the advances would be recouped from the 500 weeks of permanent partial benefits he would receive after the age of 65 rather than from his current bi-weekly benefits. (Tr. at 5.) **There was no written agreement on recoupment.** [Emphasis added.]

Petitioner objects to the highlighted portion of the paragraph. He argues that there in fact was a written agreement on recoupment, referring the Court to the three petitions for lump sum advances. He further contends that the agreement was for the State Fund to recoup the advances out of his future permanent partial disability benefits. Since he has now been determined to be permanently totally disabled, unless his condition improves those partial benefits will not commence until petitioner reaches age 65, which is in 12 years.

The Court has reviewed each of the three petitions. Each contains the following open-ended language concerning recoupment:

I understand that such a lump sum advance payment will be deducted from any award or settlement I may receive in the future.

The petition does **not** state that the advances will be recouped only from future permanent partial disability benefits. The manner and time of recoupment is simply left open.

Petitioner also claims that the trial testimony established an unwritten understanding by both parties that the advances would be recouped only out of permanent partial disability benefits. The Court has reviewed the transcript pages cited by petitioner. The testimony fails to establish that petitioner and the State Fund ever reached an express agreement. The testimony to which petitioner refers concerns each party's "understanding" regarding recoupment. Petitioner stated that he understood the advances would come out of permanent partial benefits he would receive after reaching age 65. Willem Visser, a claims supervisor for the State Fund, testified that the State Fund assumed at the time the advances were made that they would be recovered from permanent partial benefits paid upon petitioner reaching maximum healing. At the time, the State Fund did not believe petitioner would be permanently totally disabled. Thus, while both parties may have "assumed" that recoupment would be made from permanent partial disability benefits, they had very different assumptions concerning the nature of petitioner's permanent disability (permanent versus partial) and the timing of the permanent partial disability benefits and recoupment.

It is doubtful that there can be an agreement based on uncommunicated understandings of two parties, but, more apropos here, there can be no agreement without a meeting of the minds. "There must be mutual assent or a meeting of the minds on all essential terms to form a binding contract." ***Keesun Partners v. Ferdig Oil Co.,*** *249 Mont. 331, 337, 816 P.2d 417 (1991).* There was no meeting of the minds in this case, at least with respect to recoupment of the advances. The petition left the matter up in the air. The parties each had their own understanding but based on different assumptions, and thus contemplated different times for recoupment. The hearing examiner's finding in paragraph 10, and his resolution of the recoupment dispute, are supported by the evidence and will not be disturbed.

2. Motion To Amend Pretrial Order

In his MOTION TO AMEND PRETRIAL ORDER, the petitioner asks that the first issue presented to the Court be rephrased to read:

Whether the Defendant is currently entitled to recoup from the Claimant's biweekly total disability benefits, lump sum advances previously paid.

The issue was stated in the Pretrial Order, and adopted for purposes of decision, as follows:

Whether the Claimant is entitled to reinstatement of his full total disability benefits pursuant to MCA Section 39-71-702 (1985).

At the time of hearing the parties were invited to rephrase the first issue. Respondent submitted a proposed new version but petitioner did not. In any event, the original phraseology was adopted by the Court.

The petitioner's proposed revision would have the effect of limiting the Court's decision to the State Fund's entitlement to recoup the lump sum advances. Thus, it would preclude consideration of current deductions being made by the State Fund to recoup an overpayment created by a retroactive award of social security benefits to petitioner. (This overpayment was already known and is not the same one discussed in the first part of this Order.)

The petitioner's motion to amend is denied. Petitioner filed this action seeking a restoration of his biweekly benefits to their full level. In other words, he was seeking to postpone the recoupment of the social security overpayment, as well as recoupment of the lump sums. The entitlement of the State Fund to recover both the overpayment and the lump sums from petitioner's current benefits was therefore an essential element of the controversy. Thus, as originally framed, the first issue encompassed resolution of those matters. While it might have been more clearly stated, there is no compelling reason to revise the issue at this time.

ORDER

For the reasons set forth in the foregoing discussion,

IT IS HEREBY ORDERED as follows:

1. Paragraph 16 of the hearing examiner's findings of fact is **stricken**.

2. Paragraph 18 of the hearing examiner's findings of fact is revised as follows:

18. Without recoupment claimant's current monthly income from his workers' compensation benefits and social security disability is approximately $1,376.19. (Tr. at 21; Ex. 10.) With a recoupment of $39.95 claimant's income is $1,336.24 per month leaving him a surplus after paying his $1,201.89 monthly expenses even without considering his wife's social security income.

3. The fourth, fifth, sixth and seventh paragraphs of second conclusion of law are stricken. The tenth paragraph of that conclusion is revised to read as follows:

Given the fact that the claimant had a history of hypertension and chest pains, is overweight and 52 years of age, forcing the defendant to wait until the "distal end" of the claimant's benefit entitlement places all the risk of recovery on the defendant, and no risk on the claimant. Should the claimant not survive until his 65th birthday, the only further

entitlement would be his impairment award. Defendant could not have a repayment of the past advances. Given the claimant's health risks in this case, and the size of advances and overpayments already paid the claimant, the defendant's concerns are legitimate. Consequently, it is only fair to the defendant to permit it to continue with the recoupment program it initiated on June 23, 1992.

4. Paragraph 2 of both the proposed judgment and the judgment are revised to read as follows:

2. Defendant is entitled to continue to recoup the sum of $39.95 from claimant's current biweekly benefits.

5. Petitioner's MOTION TO AMEND PRETRIAL ORDER is **denied.**

6. Petitioner's request for a new trial is **denied.**

DATED in Helena, Montana, this 28th day of December, 1993.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Darrell S. Worm
Mr. Thomas R. Bostock