

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MT WCC 84

WCC No. 9801-7909

WILLIAM R. PITTSLEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

3-MOR ENTERPRISES

Employer.

ORDER DENYING PENALTY AND ATTORNEY FEES

Summary: Following grant of partial summary judgment, parties presented issue of penalty and attorneys' fees on stipulated facts. Since resolution of the case turned on a legal issue, the question is whether the legal position taken by the insurer was unreasonable.

Held: The insurer's position was not unreasonable, particularly where important legal precedent supporting the WCC decision was not cited by claimant, but rather found by the Court. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1991). Where a claimant seeks penalty and attorneys fees following a grant of summary judgment turning interpretation of statutes, regulations, and case law, the question is whether the legal position taken by the insurer was unreasonable. In this case, important legal precedent was found by the Court's own research. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1991). Where a claimant seeks penalty and attorneys fees following a grant of summary judgment turning interpretation of statutes, regulations, and case law, the question is whether the legal position taken by the insurer was unreasonable. In this case, important legal precedent was found by the Court's own research. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

Attorney Fees: Cases Denied. Where a claimant seeks penalty and attorneys fees following a grant of summary judgment turning interpretation of statutes, regulations, and case law, the question is whether the legal position taken by the insurer was unreasonable. In this case, important legal precedent was found by the Court's own research. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

Attorneys Fees: Unreasonable Denial or Delay of Payment. Where a claimant seeks penalty and attorneys fees following a grant of summary judgment turning interpretation of statutes, regulations, and case law, the question is whether the legal position taken by the insurer was unreasonable. In this case, important legal precedent was found by the Court's own research. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

Penalties: Insurers. Where a claimant seeks penalty and attorneys fees following a grant of summary judgment turning interpretation of statutes, regulations, and case law, the question is whether the legal position taken by the insurer was unreasonable. In this case, important legal precedent was found by the Court's own research. It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position. Attorneys fees and penalty denied.

¶1 On July 31, 1998, this Court entered partial summary judgment holding that saw rental paid to the claimant by his employer must be included in computing claimant's compensation benefits. The Court reserved for trial the claimant's request for attorney fees and a penalty. Thereafter, the parties requested the Court to decide the attorney fees and penalty issues based upon a stipulation of facts. The stipulation was filed October 7, 1998. The briefing was completed on October 13, 1998.

Factual Background

¶2 Claimant, a logger, was injured on December 13, 1991. (Stipulated Statement of Uncontroverted Facts (October 7, 1998), Fact 1.) Based on the total amount paid him by his employer, claimant was entitled to benefits of \$336 per week, less any social security offset. (Partial Summary Judgment (July 31, 1998) at 7.) However, his gross earnings were allocated 75% for wages and 25% for saw rental. (*Id.* at 5.)

¶3 In a 1989 decision, this Court determined that saw rental of a sawyer (logger) are wages for purposes of determining benefits. *Bobby Guckenberg v. State Compensation Ins. Fund*, WCC No. 8808-4883, Findings of Fact and Conclusions of Law and Judgment (June 20, 1989). The case was decided under the 1987 version of the Workers' Compensation Act (WCA).

¶4 At the time of the *Guckenberg* decision, the WCA defined wages as "gross remuneration paid in money, or in substitute for money, for services rendered by an employee." § 39-71-123(1), MCA (1987). It also set out a list of payments which could not be included in wages. § 39-71-123(2), MCA. That list did not refer to saw rental.

¶5 In 1991, the legislature amended section 39-71-123(2), MCA, to provide that the Department of Labor and Industry could determine by rule what "other" employee expenses should be excluded in computing wages for compensation purposes.

(2) "Wages" do not include:

(a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, **and other expenses, as set forth in department rules.** [Emphasis added.]

That statute was effective October 1, 1991. §1-2-201, MCA.

¶6 The Department thereafter adopted a rule limiting the amount which could be excluded for saw rental to \$22.50 per work day. (Partial Summary Judgment at 4.) The rule was published and adopted in 1992; it was effective December 25, 1992. 1992 MAR p. 2753.

¶7 In granting partial summary judgment, I found that the rule against retroactive application of a statute applies to a retroactive application of an administrative regulation. I therefore granted claimant's request that his benefits be recomputed without consideration of saw rental. Claimant now pursues his requests for attorney fees and a penalty.

¶8 In excluding saw rental, the State Fund relied on both section 39-71-123(2), MCA, as amended in 1991, and ARM 24.29.720(2)(d). Certainly its reliance on the amended statute was justified. The 1991 amendment was effective October 1, 1991, § 1-2-201, MCA, which was prior to claimant's injury. He can hardly complain that application of the statute to his injury is a retroactive application, thus the State Fund's reliance on the statute was not

unreasonable. Whether its reliance on the regulation adopted under the statute was reasonable presents a closer question.

¶9 While claimant argued that application of the 1991 statutory amendment is "contingent upon the promulgation of department rules to specify what expenses would be excluded from wages and to what extent," Motion for Partial Summary Judgment and Brief in Support at 2, he did not cite a single case in support of his contention. The Court did its own legal research and found dictum in Montana Supreme Court cases which indicate that the rule against retroactive application of statutes also prohibits retroactive application of administrative regulations. (Partial Summary Judgment at 6 (citing *Porter v. Galarneau*, 275 Mont. 174, 182, 911 P.2d 1143, 1148 (1996); *Haugen v. Blaine Bank of Montana*, 279 Mont. 1, 7, 926 P.2d 1364, 1367 (1996)).) It is difficult to find an insurer's legal position unreasonable when a claimant's attorney does not cite legal precedent to support his or her position.

¶10 Moreover, while persuasive, the precedent found by the Court is dictum. The Montana Supreme Court has not directly confronted the issue of retroactive administrative rules, thus the matter is not beyond the pale of argument.

¶11 The State Fund also urges that "it reasonably urged this Court to revisit and overturn the rule set forth in Guckenberg v. State Compensation Ins. Fund, WCC No. 8808-4883, *Findings of Fact and Conclusions of Law and Judgment*, (June 20, 1989)." (Respondent's Brief in Opposition to Award of Fees, Costs and Penalties at 1.) *Guckenberg* held that under the law in effect prior to the 1991 amendment of section 39-71-123, MCA, saw rental should be included in gross income.

¶12 If the State Fund intended to ask the Court to reconsider *Guckenberg*, it did a poor job of articulating its request. In its Reply to Petitioner's Motion for Partial Summary Judgment at 2, it argued, "Guckenberg is inapplicable to the case at bar . . . [since] . . . it was concerned with the 1987 version of the Workers' Compensation Act." Nowhere in its brief did it set out reasons the decision should be overruled. In denying partial summary judgment the Court specifically noted, "The State Fund does urge that it [*Guckenberg*] should be overruled." The statement contains a typographical error: it omitted the word "not" before the word urge. Thus it should have read, "The State Fund does **not** urge that it [*Guckenberg*] should be overruled." (Partial Summary Judgment at 3.)

¶13 Nonetheless, a request for reconsideration of *Guckenberg* is not unreasonable. Section 39-71-123, MCA (1987), contained language of inclusion and exclusion. It set out what should be included in wages while separately setting out what should be excluded. While the exclusions did not include saw rental payments, payments for saw rental arguably do not meet the language setting out what constitutes gross income. Section 39-71-123(1), MCA (1987-91), defined wages as "gross remuneration paid in money, or in a substitute for money, **for services** rendered by on employee." Arguably, saw rental

payments which reflect a fair payment for the cost of the saw, and its maintenance, gas and oil, are not for services and therefore do not meet the gross income requirement.

¶14 In articulating arguments that might be made for overruling *Guckenberg*, I do not intend to suggest that had those arguments been squarely presented by the State Fund I would have overruled *Guckenberg*. The decision is almost a decade old. Claimants and insurers have relied upon the decision in the intervening decade. Persons subject to particular laws should be able to rely upon judicial decisions interpreting and applying them. Courts should abhor changing rules retrospectively and punishing conduct which they previously condoned.

ORDER

¶15 In excluding saw rental payments, the State Fund did not act unreasonably and claimant is not entitled to either a penalty or attorney fees. However, since claimant has prevailed on the merits, he is entitled to his costs.

DATED in Helena, Montana, this 19th day of November, 1998.

(SEAL)

\s\ McCarter

JUDGE

c: Mr. Steve Fletcher

Ms. Carrie L. Garber

Submitted: October 13, 1998