IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 44A

WCC No. 2000-0257

WILLIAM POLK

Appellant

vs.

PLANET INSURANCE COMPANY

Respondent/Cross Appellant

AMENDED ORDER ON APPEAL

APPEALED 6/28/02

Dismissed by Agreement 10/29/02

See Memorandum Regarding Constitutional Challenges

Summary: In a prior Order on Appeal, the Workers' Compensation Court determined that the apportionment requirement of the Occupational Disease Act is unconstitutional. The matter was remanded to the Department of Labor and Industry with directions to strike the 20% reduction in benefits. Further, the attorney fee award made by the Department was reversed as contrary to statute. Following entry of the Order, the insurer pointed out that the Court had failed to address its contention that claimant is not entitled to costs. Those costs are substantial, amounting to approximately $30,000.

Held: The claimant is entitled to his costs. While the statute governing costs does not allow costs, the provision violates equal protection guarantees since there is no rational basis for allowing such costs to claimants under the Workers' Compensation Act while denying costs to claimants under the Occupational Disease Act.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-72-613, MCA (1993). The 1993 Occupational Disease Act does not provide for an award of costs to a claimant where the claimant requests a hearing before the Department or appeals an adverse determination by the Department.

Constitutional Law: Constitutional Challenges: Notice. A party raising a constitutional issue is not required to give notice of the challenge to the Attorney General since the Workers' Compensation Court has assumed responsibility for giving that notice.

Procedure: Rules. While the Workers' Compensation Court may look to the Montana Rules of Civil Procedure where its own rules are silent, it is not required to adopt the Rules of Civil Procedure.

Procedure: Rules. While Rule 24(d), Mont.R.Civ.P., requires the party raising a constitutional issue to give the Attorney General notice of the challenge, the Workers' Compensation Court has assumed responsibility for giving that notice.

Costs: Occupational Disease Cases. The 1993 version of the Occupational Disease Act allows costs only where the insurer requests a hearing before the Department or appeals a Department finding of an occupational disease.

Costs: Occupational Disease Cases. The 1993 version of the Occupational Disease Act, which allows costs only where the insurer requests a hearing before the Department or appeals a Department finding of an occupational disease, is unconstitutional since it denies claimants their right to equal protection of the laws. There is no rational basis for denying costs in occupational disease cases while allowing them in workers' compensation cases. *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456

Constitutional Law: Equal Protection. The 1993 version of the Occupational Disease Act, which allows costs only where the insurer requests a hearing before the Department or appeals a Department finding of an occupational disease, is unconstitutional since it denies claimants their right to equal protection of the laws. There is no rational basis for denying costs in occupational disease cases while allowing them in workers' compensation cases. *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456

Cases Discussed: *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456. The 1993 version of the Occupational Disease Act, which allows costs only where the insurer requests a hearing before the Department or appeals a Department finding of an occupational disease, is unconstitutional since it denies claimants their right to equal protection of the laws. There is no rational basis for denying costs in occupational disease cases while allowing them in workers' compensation cases.

¶1 This Court previously entered its Order on Appeal, reversing the Department's 20% reduction of benefits and its award of attorney fees. Following entry of the Order, Planet Insurance Company (Planet) moved the Court for a further, *nunc pro tunc*, order reversing the Department's award of costs. After reviewing the request I determined that I had wholly overlooked the costs issue, which was raised by Planet's cross-appeal. I therefore stayed

certification of the Order on Appeal and requested further briefing. (Order Staying Certification of Judgment.) I also noted that in its prior brief in opposition to Planet's costs argument, claimant had challenged the constitutionality of the Occupational Disease Act's provision governing an award of costs. I therefore ordered that notice of the constitutional challenge be given to the Attorney General and that the parties further brief the constitutional issue.

Discussion

I.

¶2 Initially, Planet objects to the Court's consideration of the constitutional issue because notice was not previously given to the Attorney General. It cites Rule 24(d), Mont. R.Civ.P. as authority.

¶3 Rule 24(d) has never been formally adopted by this Court. While the Workers' Compensation Court may look to the Montana Rules of Civil Procedure for guidance in procedural matters which are not encompassed in its own rules, *Murer v. Montana State Compensation Mut. Ins. Fund,* 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993), it is not required to do so in every instance.

¶4 Rule 24(d) requires the party raising the constitutional issue to provide the Attorney General with contemporaneous notice of the challenge.[(1)] However, as I noted in my Order Staying Certification of Judgment, this Court in recent years has taken on the responsibility of notifying the Attorney General of constitutional challenges. Indeed, following issuance of the Order, the Court provided the Attorney General with such notice and invited him to intervene. He declined to do so. (Notice of Intent Not to Intervene (received December 3, 2001).)

¶5 Planet's objection is **overruled**.

II.

¶6 The provision governing costs is the same provision which governs attorney fees. Section 39-72-613, MCA (1993),[(2)] provides:

39-72-613. Costs and attorney fees. (1) If an insurer requests that a hearing be held before the department and the claim is determined compensable by the department after the hearing and the insurer does not appeal the department's decision to the workers' compensation judge, reasonable costs and attorney fees, as determined by the department, shall be paid to the claimant's attorney by the insurer.

(2) If an insurer appeals a decision of the department to the workers' compensation judge or from the judge to the supreme court and the claim is determined compensable, reasonable costs and attorney fees, as determined by the workers' compensation judge,

shall be paid to the claimant's attorney by the insurer for proceedings before the department, the workers' compensation judge, and the supreme court.

I considered this section in my prior Order on Appeal, holding that the claimant is not entitled to attorney fees under the section since the insurer did not initiate the proceeding before the Department and did not appeal the Department's decision concerning liability. Since the section governs both "reasonable costs and attorney fees," the same holding applies to an award of costs. By implication, section 39-72-613, MCA, precludes an award under other circumstances. *State ex rel. Jones v. Giles,* 168 Mont. 130, 133, 541 P.2D 355, 357 (1975)("In determining legislative intent, an express mention of a certain power or authority implies the exclusion of nondescribed powers."). Therefore, claimant is not entitled to *either* attorney fees or costs under the Occupational Disease Act (ODA).

III.

¶8 In light of the holding above, the claimant's constitutional challenge must be addressed. He argues that the denial of costs violates his right to equal protection since he would be entitled to costs if his claim was cognizable under the Workers' Compensation Act (WCA).

¶9 In *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 448, 982 P.2d 456, the Montana Supreme Court held that the failure to provide rehabilitation benefits to disabled workers suffering from occupational diseases is a violation of equal protection guarantees, at least where the disease involves a herniated disk.

Regardless of the number of days or the mechanism by which a worker incurs an affliction, the fact remains that both classes of individuals have suffered work-related injuries, are unable to perform their former jobs, and need rehabilitation benefits to return to work. Both workers have as their sole source of redress the WCA or the ODA. As it applies to Henry in particular, both classes involve workers who have suffered the exact same work-related injury, herniated discs, and both need rehabilitation benefits to return to work as soon as possible. We conclude that the classes are similarly situated for equal protection purposes.

Henry ¶ 28. The Court went on to hold that there was "no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts." *Henry* ¶ 44.

¶10 If there is no rational basis for "treating workers who are injured over one shift differently from workers who are injured over two shifts," I perceive no rational basis for denying claimant his substantial costs in this case. Litigation costs reduce the net award to the claimant. In this case, the costs are substantial, amounting to approximately $30,000. The claim was vigorously contested. Extensive expert medical testimony was required and the initial Department decision was appealed to this Court, thence to the Supreme Court,

and ultimately remanded to the Department for further proceedings which required further expert medical testimony.

¶11 Planet argues that *Henry* is factually distinguishable. It argues that the claimant's lung disease, variously diagnosed as a combination of hypersensitivity pneumonitis, occupational asthma, bronchiectasis, and emphysema, *Polk v. Planet Ins. Co,* 287 Mont 79, 82, 951 P.2d 1015, 1017 (1997), is different from the herniated disk at issue in *Henry* because it is a "progressive" condition.

¶12 I am unable to discern the distinction tendered by Planet. In *Henry* the Supreme Court found that whatever "the number of days or the mechanism by which a worker incurs *an affliction*, the fact remains that both classes of individuals have suffered work-related injuries, are unable to perform their former jobs, and need rehabilitation benefits to return to work." *Henry* ¶ 28. Planet's argument that the claimant's affliction in this case "squarely" falls within the ODA,[3] attempts to draw a factual distinction between conditions that can arise on account of either a single incident or multiple incidents, which Planet concedes are within *Henry*, and conditions which can only arise on account of multiple incidents, which Planet contends are different and outside of the holding in *Henry*. That analysis would create a subclass within the Occupational Disease Act, a subclass consisting of claimants whose conditions could not have possibly arisen or been aggravated as the result of a single trauma or event. Under Planet's logic, some occupational disease claimants would be entitled to the more liberal benefits of the Workers' Compensation Act, while others would not.

¶13 Planet's argument is interesting, however, it is unpersuasive. As I read *Henry*, the Supreme Court held that what is important for equal protection analysis is the fact that the claimant's affliction (condition) is work related and that distinctions based upon the period of time over which the affliction developed are irrational, at least under Montana statutes defining workers' compensation injuries and disease. Moreover, the factual distinctions tendered by Planet are suspect. Certainly, pulmonary conditions may develop over time, however, a review of reported cases indicates that conditions normally thought to be the result of repeated exposures also may result from a single exposure. For example, in *Bremer v. Buerkle,* 223 Mont. 495, 727 P.2d 529 (1986), the claimant suffered an allergic reaction to chemicals. He had been exposed to the chemicals over nine years, however, "a single exposure unexpectedly stimulated his immune system and led to the [disabling] allergy." *Id*. at 501, 727 P.2d at 523.

¶14 Applying *Henry*, I find that section 39-72-613, MCA (1993), is unconstitutional with respect to costs. Under the WCA, claimant would be entitled to recover his costs. There is no rational basis for denying him costs just because his condition and disability fall under the ODA.

¶15 My decision in this matter does not extend to attorney fees. I previously determined that the statute does not allow for an award of attorney fees. Claimant has not challenged the constitutionality of the attorney fee provision, probably with good reason: The WCA provides for attorneys' fees only where the insurer's denial of benefits was unreasonable. §§ 39-71-611 and -612, MCA (1993).

IV.

¶16 The Department decision reserved determination of the amount of costs due claimant pending this appeal. In this appeal, claimant has submitted a memorandum of costs and Planet has submitted objections to some of those costs. Since section 39-72-613, MCA, provides for an assessment of costs by the Department, this matter must be remanded to the Department for that assessment.

JUDGMENT

¶17 Based on the Court's August 17, 2001 Order on Appeal, and the foregoing discussion, FINAL JUDGMENT IS ENTERED AS FOLLOWS:

¶18 The *Final Agency Decision* is **reversed** insofar as it ordered a reduction in claimant's benefits by 20% and awarded attorney fees to claimant. The matter is remanded to the Department with instructions that it amend its decision in the following respects:

¶18a Claimant is entitled to full benefits without the 20% reduction.

¶18b Claimant is not entitled to attorney fees.

¶18c Claimant is entitled to costs in an amount to be determined by the Department.

¶19 Upon remand, the Department shall determine the amount of costs due the claimant.

¶20 This JUDGMENT is certified as final.

¶21 Any party to this dispute may have 20 days in which to request a rehearing from this Amended Order on Appeal.

DATED in Helena, Montana, this 31st day of May, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard F. Strause
Ms. Sara R. Sexe
Submitted: December 3, 2001

1. Rule 24(d) provides:

(d) Cases Involving Constitutional Questions Where the State is not a Party. When the constitutionality of any act of the Montana legislature is drawn in question in any action, suit or proceeding to which neither the state nor any agency or any officer or employee thereof, as such officer or employee, is a party, the party raising the constitutionality of the act shall notify the Montana attorney general and the court of the constitutional issue. This notice shall be in writing, shall specify the section of the code or chapter of the session law to be construed and shall be given contemporaneously with the filing of the pleading or other document in which the constitutional issue is raised. The attorney general may within 20 days thereafter intervene as provided in Rule 24(c) on behalf of the state.

2. The 1993 version of the Occupational Disease Act applies in this case. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Section 39-72-613, MCA (1993), was repealed in 1999. 1999 Mont. Laws, ch. 442, § 26.

3. Planet Insurance Company's Brief on Appeal at 6.