IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 44

WCC No. 2000-0257

WILLIAM POLK
Appellant
vs.
PLANET INSURANCE COMPANY
Respondent/Cross Appellant.

ORDER ON APPEAL

Summary: This is a second appeal involving a 1994 occupational disease claim by William Polk. The Department of Labor and Industry (Department) initially determined that William Polk (Polk) did not suffer from an occupational disease, and he requested a contested case hearing. After a hearing, a Department hearing officer affirmed the finding and Polk appealed to this Court, which affirmed the Department. He then appealed to the Supreme Court, which reversed and remanded after finding that the hearing officer had used an improper causation standard. A new contested case hearing was held, after which the Department found that Polk suffers from an occupational disease but reduced his benefits by 20% due to contributing non-occupational factors. The Department also awarded attorney fees.

Held: Since this Court has previously held in *Schmill v. Liberty Northwest Insurance Corporation,* 2001 MTWCC 36, that the apportionment provision set forth in section 39-72-706, MCA, of the Occupational Disease Act is unconstitutional, the Department erred in reducing the claimant's benefits by 20%. It further erred in awarding attorney fees since the insurer did not request the hearing before the Department and has not appealed the Department's determination of compensability. § 39-72-613, MCA (1993).

Topics:

Occupational Disease: Apportionment. Since the post-1987 apportionment provision of the Occupational Disease Act is unconstitutional, a claimant's benefits cannot be reduced on account of the contribution of non-occupational factors to his occupationally related condition.

Attorney Fees: Occupational Disease Cases. Under section 39-72-613, MCA (1993), which provided for attorney fees in occupational disease cases in which the insurer requests a contested case hearing or appeals a Department determination of compensability to the Workers' Compensation Court, no attorney fees are allowable where the claimant made the original request for a Department hearing and the second hearing, at which claimant prevailed, was held only because the Supreme Court reversed a finding of non-compensability because of an error of law in the first proceeding.

¶1 This is a judicial review of a *Final Agency Decision* of the Department of Labor and Industry finding claimant suffers from an occupational disease, apportioning the disease 80% to occupational factors and 20% to non-occupational factors, and awarding attorney fees. For the reasons set forth below, the apportionment determination and attorney fee award are **reversed**.

Factual Background

¶2 Claimant in this matter filed a claim for occupational disease benefits back in January of 1994. His claim was referred to a medical panel of three physicians, two of whom concluded that he did not suffer from an occupational disease. Based on the panel report, the Department issued a determination that his claim was not compensable. Claimant appealed the determination and the matter went to hearing before a Department hearing officer who affirmed the original determination. Claimant then appealed to this Court, which affirmed, however, on further appeal to the Supreme Court, the hearing officer's decision was reversed because he had applied an incorrect causation standard. *Polk v. Planet Ins. Co.,* 287 Mont. 79, 951 P.2d 1015 (1997). The matter was thereafter remanded to the Department, which conducted another evidentiary hearing. Following that hearing, the Department's hearing officer issued the decision which is the subject of the present appeal.

Scope of Appeal and Standard of Review

¶3 There are two appeals in this matter. The first filed appeal is by the claimant, who urges that the hearing officer erred in apportioning 20% to non-occupational factors and reducing his benefits by that amount. The second appeal is by the insurer, Planet Insurance Company (Planet), which argues it was error to award attorney fees. Neither party has requested a transcript of the evidentiary hearing. Therefore, they do not attack the hearing officer's findings of fact, *per se.*

¶4 Since the only issues raised are legal ones involving interpretation and constitutionality of the specific provisions of the Occupational Disease Act, this Court reviews the decision below to determine if the decision was "in violation of constitutional or statutory provisions" or "affected by other error of law." § 2-4-704(2)(a)(i) and (iv), MCA.

Discussion

I. Apportionment

¶5 While the present appeal was pending, this Court handed down its decision in *Schmill v. Liberty Northwest Insurance,* 2001 MTWCC 36, holding that apportionment pursuant to section 39-72-706, MCA , is unconstitutional. In a supplemental brief filed July 2, 2001, claimant requests the Court to apply the decision to this case. I find no good reason not to, therefore, without addressing claimant's other arguments concerning the apportionment issue,[(1)] I conclude that the 20% reduction in benefits ordered by the hearing officer must be reversed and the case remanded with directions to amend the decision to provide that benefits shall be paid at 100% of the statutory rates.

II. Attorney Fees

¶6 At the time of onset of the claimant's occupational disease and the filing of his claim, section 39-72-613, MCA (1993), governed an award of attorney fees in occupational disease cases, providing:

> **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.

The section was repealed in 1999. 1999 Mont. Laws, ch. 442, § 26. However, there is no provision in the 1999 laws making the repeal retroactive, and since it provides for a monetary award, the provision is substantive and may not be applied retroactively, *see Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Therefore, it governs any award of attorney fees in the present case.

¶7 Claimant argues that because Planet opposed the hearing being held in the Workers' Compensation Court following remand by the Supreme Court in *Polk v. Planet Ins. Co.,* 287 Mont. 79, 951 P.2d 1015 (1997), it should be deemed to have requested a hearing before the Department and therefore subject to an award of attorney fees under subsection (1) of 39-72-613, MCA (1993). The argument is specious. The remand was merely a continuation of the original matter in which claimant, not Planet, requested a contested case hearing. Moreover, while claimant requested that the hearing on remand be held in this Court, at the time of the request on March 19, 1998, and even at the time Planet filed an opposition to the request on April 8, 1999, this Court lacked jurisdiction over occupational disease cases in which liability has been wholly denied. Even after April 23, 1999, when an amendment gave the Court jurisdiction, 1999 Mont. Laws, ch. 442, § 23, the amendment was expressly inapplicable to cases arising prior to April 23, 1999 unless both parties agreed to transfer the case to the Court. Refusal to agree to a transfer does not amount to a request for a hearing before the Department. The hearing had already been requested by claimant in his original petition and he was not legally entitled to insist on a different forum. Therefore, his claim for fees under subsection (1) must fail.

¶8 Similarly, a claim under subsection (2) of section 39-72-613, MCA (1993), is without merit since the insurer did not appeal the Department decision to the Court, rather it was claimant who appealed the unfavorable decision below. The present appeal by Planet also does not qualify under subsection (2) since it is not an appeal on the merits

of compensability. The decision of compensability of the claim was made below, thus it was the Department that determined compensability, not this Court.

¶9 Since, as a matter of law, the claimant was not entitled to recover attorney fees under section 39-72-613, MCA (1993), the hearing officer erred in awarding fees.

ORDER

¶10 The *Final Agency Decision* is **reversed** insofar as it ordered a reduction in claimant's benefits by 20% and awarded attorney fees to claimant. This matter is remanded to the Department with directions that it amend its decision in accordance with this Order on Appeal.

¶11 This decision is otherwise certified as final for purposes of appeal. ARM 24.5.348.

¶12 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Order on Appeal.

DATED in Helena, Montana, this 17th day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard F. Strause
Ms. Sara R. Sexe
Ms. Sandy M. Duncan
Submitted: July 2, 2001

1. There is no need to address claimant's other arguments. Since they are legal arguments, even if the Supreme Court were to reverse *Schmill* and/or its application in this case, it is in as good of a position as this Court to address the other arguments.