

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 1

WCC No. 9306-6811

THEODORE RUSSETTE, JR.

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CHIPPEWA CREE HOUSING AUTHORITY

Employer.

DECISION AND ORDER

This case is presented on an agreed statement of facts. Petitioner suffered an industrial accident on September 26, 1991. On October 13, 1992, he reached maximum healing and became eligible for permanent partial disability benefits. However, by that time he had turned 62 years of age and had elected to receive early social security retirement benefits. He began receiving those benefits prior to October 13, 1992. The sole issue presented herein is one of statutory interpretation involving section 39-71-710, MCA. The parties have phrased the issue as follows:

Whether Claimant may be legally due compensation under Section 39-71-703, M.C.A. for permanent partial disability based upon the factors set forth in such statute in addition to the impairment rating, even though Claimant is receiving Social Security Retirement benefits.

Agreed Facts

As a part of the Pretrial Order the parties agreed and stipulated that the following facts are true:

- a. Claimant sustained an injury to his left hip on September 26, 1991, while in the course and scope of his employment as a maintenance worker for the Chippewa Cree Housing Authority;
- b. The accident occurred on the Rocky Boy Reservation. Venue is in Great Falls;

- c. The employer is insured through Plan III;
- d. The insurer has accepted liability for the accident of September 26, 1991;
- e. Temporary total disability benefits were initiated on September 26, 1991, in the amount of \$213.33 per week, until the Claimant was determined to have reached maximum medical healing on October 13, 1992;
- f. Upon maximum medical improvement, Claimant was given an impairment rating of 17% by Dr. Ronald M. Peterson;
- g. On October 13, 1992, permanent partial disability benefits based on the impairment rating were begun in the amount of \$168.00 per week for a period of 59.50 weeks.
- h. Claimant is currently receiving Social Security Retirement benefits, having elected to receive such benefits at age 62 and having begun to receive such benefits prior to October 13, 1992; and
- i. Because Claimant has been receiving Social Security Retirement benefits prior to the date of maximum medical improvement, the State Fund has claimed that Claimant is due no further permanent partial disability award other than payment for the impairment rating.

They further agreed that additional evidence is unnecessary to the resolution of the issue presented and that the case should be submitted on briefs. Having received and considered the agreed statement of facts and the parties' briefs, the matter is ready for decision.

Discussion

The statute at issue is section 39-71-710, MCA, which was last amended by the 1987 legislature. As amended it provides:

39-71-710. Termination of benefits upon retirement. (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of **wage supplement**, permanent total disability, and rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, **any impairment award**, and medical benefits.

(2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for

temporary total disability benefits, **any impairment award**, and medical benefits.
[Emphasis added.]

Only subsection (1) is at issue in this case. However, subsection (2) must be considered in determining legislative intent and purpose.

The 1987 legislature also amended provisions governing permanent partial disability benefits. Prior to 1987, claimants could elect between indemnity awards (section 39-71-705, MCA (1985)) and benefits based on lost earning capacity (section 39-71-703, MCA (1985)). The legislature repealed both of those alternatives and instead authorized impairment awards and wage loss benefits. The new provisions were codified in an amended section 39-71-703, MCA (1987), which provided in relevant part:

39-71-703. Compensation for permanent partial disability -- impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. . . .

(a) The following procedure must be followed for an impairment award:

(i) Each percentage point of impairment is compensated in an amount equal to 5 weeks times 66% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.

(ii) When a worker reaches maximum healing, an impairment rating is rendered by one or more physicians as provided for in 39-71-711. Impairment benefits are payable beginning the date of maximum healing.

(iii) An impairment award may be paid biweekly or in a lump sum, at the discretion of the worker. . . .

. . . .

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. . . .

. . . .

The impairment award provided under subparagraph (a) was based on an impairment rating, which is purely a medical determination. Section 39-71-711 (1) (a), MCA (1987) provided:

Impairment evaluation -- ratings. (1) An impairment rating:

- (a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;
- (b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American Medical Association; and
- (c) must be expressed as a percentage of the whole person.

. . . .

While the 1991 legislature amended the specifics for rendering and using impairment ratings, the quoted portion of section 39-71-711, as well as the nature of the rating, was not changed.

The present controversy arises because the 1991 legislature again amended the provisions for permanent partial disability benefits. It eliminated the two types of awards provided by the 1987 legislation, substituting a single "permanent partial disability award." Section 39-71-703(1), MCA (1991) (1991 Mont. Laws, sec. 4, ch. 574). The new award is determined by multiplying a percentage, which is calculated pursuant to subsection (3) of the amended statute, by 350 weeks. The product is the number of weeks the injured worker is entitled to receive permanent partial disability benefits. The weekly benefit rate is fixed at two-thirds of the worker's wages at the time of injury, or one-half the state's average weekly wage, whichever is less. Section 39-71-703(4), MCA (1991).

The factors specified by section 39-71-703(3) as the basis for determining the percentage to be used in calculating benefits are, in summary form:

- 1) impairment rating;
- 2) age;
- 3) education;
- 4) actual wage loss;
- 5) restriction on level of labor activity (heavy, medium, light); The complete provision is set out in the margin.⁽¹⁾ As written, the impairment rating is the starting point for determining the percentage; the remaining factors are add-ons. Section 39-71-703 (3), provides in relevant part:

(3) . . . The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association [sic] Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by **adding the following applicable percentages to the impairment rating:** [Emphasis added.]

. . . .

While it revised permanent partial disability benefits, the 1991 legislature did not revise section 39-71-710. The legislature's failure to revise section 39-71-710 was an obvious oversight: The **wage supplement** and **impairment award** referred to in the section no longer existed in a strict sense.

The legislature's oversight is now the grist of a legal dispute which has significant financial consequences to claimants and insurers.

Petitioner argues that he is entitled to the entire permanent partial disability benefit specified in section 39-71-703, MCA (1991), because the benefit is not among those specifically enumerated in section 39-71-710(1) as ending upon his retirement. He construes the second sentence of section 39-71-710(1) literally, arguing that the benefit specified by the 1991 legislature is not a "wage supplement", and is therefore not interrupted by his retirement.

In a perfect world, legislatures would identify, anticipate and provide for every conceivable consequence of their enactments. They would coordinate all of their enactments and insulate them from judicial interpretation. This is not a perfect world, and this Court must assume the burden of determining whether the 1991 Montana legislature intended to extend the revised permanent partial disability benefit to retired claimants.

In making its determination, the Court is guided by basic rules of statutory interpretation. The ultimate touchstone for construing statutes is the intent of the legislature. **Thiel v. Taurus Drilling Ltd**, 218 Mont. 201, 205, 708 P.2d 239 (1985) ("The judicial function in construing and applying statutes is to effect the intention of the legislature"). Legislative intent must be determined, if possible, from the plain language of the statute. **Id.** The purpose of the statute must also guide its interpretation. **Montana Talc Co. v. Cyprus Mines Corp.**, 229 Mont 491,498, 748 P.2d 444 (1987) ("Statutes may not be interpreted to defeat their object or purpose, and the object sought to be achieved by the legislature is of prime consideration in interpreting them"). Individual words and sections cannot be construed in isolation: statutes must be construed as a whole, **Darby Spar, Ltd. v. Department of Revenue**, 217 Mont. 376, 379, 705 P.2d 111 (1985), and all provisions must be coordinated and harmonized, if possible. **McClanathan v. Smith**, 186 Mont. 56 61, 606 P.2d 507 (1980). Statutory intent "cannot be derived from the definition of one word"; rather,

it must be determined "from the entire body of words taken together." **Wyse v. District Court**, 195 Mont. 434, 437, 636 P.2d 865 (1981).

When it enacted section 39-71-710, the legislature did not specifically contemplate the amendments it made to the provisions for permanent partial disability benefits. Nonetheless, the purpose and intent of the provision is clear.

The section refers to six types of benefits: (1) wage supplement, (2) permanent total disability, (3) rehabilitation, (4) temporary total, (5) impairment, and (6) medical. The first three types of benefits are unavailable to retired workers, while workers are entitled to the last three types. When enacted, the section was comprehensive. It encompassed **all** types of benefits available to injured workers. While it expressly precluded certain benefits to retired workers, it also expressly allowed certain benefits.

Petitioner has focused his argument on the benefits which are **not allowed** by section 39-71-710, and ignored that part of the section which enumerates the benefits which a retired worker may receive. Examining the section as a whole, it is apparent that with regard to permanent partial disability benefits, the legislature intended that a retired worker should receive an award based on his or her medical impairment, only. It is also apparent that the legislature intended that retired workers should not receive benefits based on lost wages or loss of ability to compete in the labor market. As amended, section 39-71-703, MCA (1991), encompasses an impairment benefit. That benefit, which is equivalent to the impairment award specified by the 1987 statute, is not at issue in this case. However, the section also encompasses benefits based on wage loss and on factors which impair a worker's ability to earn wages. The percentage specified under subsection (3)(c) is directly tied to actual wage loss. Age, education, and physical restrictions, which are the basis for the percentages specified under subsections (3)(a), (b), and (d), are directly related to a worker's potential earning capacity. **See Carroll v. Wells Fargo Armored Service Corp.**, 245 Mont. 495, 499, 802 P.2d 618 (1990) (*age, education, pain and disability are among the factors which must be considered under section 39-71-705, MCA (1985), to "indemnify the claimant for loss of future earning capacity"*).

This Court therefore concludes that section 39-71-710, MCA requires the respondent to pay petitioner a benefit based on his medical impairment rating, but that the statute precludes an award of benefits based on the factors set forth in section 39-71-703(3)(a), (b), (c) or (d). Since the impairment award is not in dispute, the petitioner is not entitled to relief.

Judgment

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The petitioner is not entitled to permanent partial benefits based on the factors set forth in section 39-71-703(3)(a), (b), (c) or (d). Since the impairment award is not in dispute, the petitioner is not entitled to relief and his petition is therefore **dismissed**.

3. Petitioner is not entitled to attorney fees, costs, or a penalty.

4. The JUDGEMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Order.

DATED in Helena, Montana, this 3rd day of January, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Daniel J. Whyte

1. (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides [sic] to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury

the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.