IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 36

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

MURALT'S TRUCK PLAZA

Employer.

DECISION AND JUDGMENT

AFFIRMED 4/10/03

Case summary: Claimant suffers from an occupational disease. Even though the Occupational Disease Act (ODA) makes no provision for impairment awards, she filed a petition alleging that she is entitled to one. Following this Court's decision in *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, which held that claimants suffering from occupational diseases are entitled to at least the same permanent partial disability benefits available to workers suffering industrial injuries, the insurer conceded liability for the impairment award but, relying on the apportionment provision of the ODA, § 39-72-706, MCA (1989-1999), reduced the award by 20% due to the 20% contribution of non-occupational factors to the claimant's condition.

Held: The apportionment provision of the ODA, § 39-72-706, MCA (1989-1999), violates the Equal Protection Clauses of the United States and Montana Constitutions. Therefore, claimants under the ODA are entitled to full benefits without any reduction based upon the contribution of non-occupational factors. Attorney fees and a penalty are denied since the insurer was entitled to rely on the presumption that the provisions of the ODA are constitutional.

Topics:

Constitutional Law: Constitutional Challenges: Burden. Statutes are presumed to be constitutional and party raising constitutional challenge must persuade the Court beyond a reasonable doubt that the statute is in fact unconstitutional.

Constitutional Law: Equal Protection. Occupational Disease Act provision which requires reduction of benefits based upon non-occupational factors (§ 39-72-706, MCA (1989-1999)) violates the Equal Protection clauses of the United States and Montana Constitutions since there is no equivalent provision in the Workers' Compensation Act.

Attorney Fees: Unreasonable Denial or Delay in Payment. Where insurer denied benefits based upon its reliance on a statute which the Court declares unconstitutional, the insurer's denial is not unreasonable and attorney fees will not be awarded. Statutes are presumed constitutional and ordinarily it is not unreasonable for a party to rely on that presumption.

Benefits: Impairment Awards. Occupational Disease Act provision which requires reduction of benefits based upon non-occupational factors (§ 39-72-706, MCA (1989-1999)) violates the Equal Protection clauses of the United States and Montana Constitutions since there is no equivalent provision in the Workers' Compensation Act. Therefore, workers with occupational disease are entitled to the full impairment award without reduction for non-occupational factors.

Penalties: Insurers. Where insurer denied benefits based upon its reliance on a statute which the Court declares unconstitutional, the insurer's denial is not unreasonable and a penalty will not be awarded. Statutes are presumed constitutional and ordinarily it is not unreasonable for a party to rely on that presumption.

Occupational Disease Act: Apportionment. Occupational Disease Act provision which requires reduction of benefits based upon non-occupational factors (§ 39-72-706, MCA (1989-1999)) violates the Equal Protection clauses of the United States and Montana Constitutions since there is no equivalent provision in the Workers' Compensation Act. Therefore, workers with occupational disease are entitled to full benefits without reduction for non-occupational factors.

¶1 This matter is submitted for decision upon agreed facts. The essential facts, as taken from the parties' Stipulation For Submission on Agreed Facts and admitted allegations in the petition, are as follows:

> ¶1A Claimant suffers from an occupational disease. Her occupational disease claim was accepted by Liberty Northwest Insurance Corporation (Liberty), which insured her employer when the claim was made.

¶1B Claimant sought an impairment award with respect to her condition. Liberty denied the request.

¶1C On May 22, 2001, this Court issued its decision in *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, in which it held that where permanent partial disability benefits available to a claimant under the Montana Workers' Compensation Act are greater than the benefits available under section 39-72-405, MCA, to a permanently partially disabled worker suffering from an occupational disease, constitutional equal protection guarantees require that benefits be computed and paid in accordance with the Workers' Compensation Act.

¶1D Following the decision in *Stavenjord*, Liberty agreed to pay the claimant an impairment award, however, applying the apportionment provision in section 39-72-706, MCA, reduced the award by 20%, which is the percentage of claimant's occupational disease attributable to non-occupational factors.

¶1E Claimant does not have an actual wage loss attributable to her occupational disease.

Issue

¶2 The parties have agreed that the only issue presented for decision is the constitutionality of the apportionment provision set forth in section 39-72-706, MCA, as applied to both the impairment award and temporary total disability benefits previously paid to claimant. As stated by the parties:

> [T]he remaining issue before the Court in this case is whether Liberty is entitled to reduce its payment of the impairment award by 20% under the apportionment statute and whether Liberty, if it may not apportion, must not only pay the additional 20% on the impairment award but also the additional 20% that was withheld from the claimant's TTD payments.

(Stipulation for Submission on Agreed Facts at 2.)

The stipulation supercedes the pleadings and the Court will therefore address the issue as stated.

Discussion

¶3 The issue in this case is the constitutionality of section 39-72-706(1), MCA (1989-1999), which requires apportionment between occupational and non-occupational factors in determining benefits under the Occupational Disease Act. The section provides:

> **39-72-706. Aggravation.** (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way

> contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

As applied in the present case, claimant's benefits were reduced by 20%, which is the amount the parties agree is the percentage by which non-occupational factors contributed to claimant's condition. Under the Workers' Compensation Act (WCA) there is no corresponding provision for reducing workers' compensation benefits based on non-occupational factors.

¶4 In *Stavenjord v. State Compensation Ins. Fund,* 2001 MTWCC 25, I held that where the permanent partial disability benefits available to a claimant under the Montana Workers' Compensation Act are greater than the benefits available under section 39-72-405, MCA, to a similarly situated worker suffering from an occupational disease, constitutional equal protection guarantees require that benefits be computed and paid in accordance with the Workers' Compensation Act. My decision was based on *Henry v. State Compensation Insurance Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), specifically paragraph 44 of that decision which said, in relevant part: "**In sum, we can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts."** (Emphasis added.)

¶5 In applying the equal protection principal set out in *Henry*, I see no possible way of distinguishing the statute at issue in this case from the statutes struck down in *Henry* and *Stavenjord*. *Henry* held that there is no rational basis for paying workers entitled to compensation under the ODA less than they would receive if their condition arises under the WCA. Applying that principle to this case, the apportionment provision does not pass constitutional muster since it results in less benefits to workers whose conditions fall under the ODA than to those whose conditions fall under the WCA. I conclude the provision is unconstitutional and unenforceable. Therefore, Liberty is liable for the full amount of the impairment award without reduction based on non-occupational factors.

¶6 Finally, the petition contains a request for attorney fees and a penalty. Both require proof that the insurer has acted unreasonably. §§ 39-71-611, -2907, MCA. The matter at hand is a legal one, therefore the claimant must show that the legal position taken by the insurer was beyond the pale of legitimate advocacy. I find that Liberty's denial of the impairment award was not unreasonable. Statutes are presumed to be constitutional and the party challenging the constitutionality of them must persuade the Court *beyond a reasonable doubt* that the statute is in fact unconstitutional. *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 428, 938 P.2d 658, 661 (1997). Liberty was entitled to rely upon the presumption that the occupational disease provisions at issue in this case are

constitutional. To its credit, Liberty conceded the impairment award immediately after I issued the *Stavenjord* decision, and did so even though that decision might be appealed. I also note that despite my reading of *Henry* as generally invalidating ODA provisions, which provide less favorable benefits than the WCA, it took nearly two years before the first post-*Henry* challenge to another provision of the ODA was submitted to me for decision, a fact that indicates that the claimant's bar was not all that confident as to the extent of the *Henry* decision. I find that Liberty's denial of an impairment award, and its position concerning apportionment were not unreasonable. Therefore, claimant is not entitled to attorney fees or a penalty.

JUDGMENT

¶7 Section 39-72-706, MCA (1989-1999), which provides for a reduction of occupational disease benefits based on the contribution of non-occupational factors to a claimant's condition is unconstitutional since it violates equal protection guarantees of the United States and Montana Constitutions.

¶8 The claimant/petitioner in this action is entitled to an impairment award without reduction.

¶9 The claimant/petitioner is not entitled to attorney fees or a penalty. She is entitled to her costs in an amount to be determined in accordance with the Court's rules.

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

¶11 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 22nd day of June, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Larry W. Jones
Submitted: June 12, 2001