IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 13

WCC No. 9908-8297

GERALD SHARP

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

TOWN OF TERRY, MONTANA

Employer.

DECISION AND JUDGMENT

Summary: PTD claimant sought order that insurer pay him impairment award in a lump sum without discount to present value. Insurer agreed to pay lump sum impairment award, but wanted present value discount.

Held: In the 1995 WCA, section 39-71-741 provides the only statutory authority for lump summing a settlement. The section does not grant the WCC authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-741, MCA (1995). In the 1995 WCA, section 39-71-741, MCA, provides the only statutory authority for lump summing a settlement. The section does not grant the WCC authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant.

Benefits: Impairment Awards. In the 1995 WCA, section 39-71-741, MCA, provides the only statutory authority for lump summing a settlement. The section does not grant the WCC authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant.

Impairment: Generally. In the 1995 WCA, section 39-71-741, MCA, provides the only statutory authority for lump summing a settlement. The section does not grant the WCC authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant.

Settlements: Lump Sum. In the 1995 WCA, section 39-71-741, MCA, provides the only statutory authority for lump summing a settlement. The section does not grant the WCC authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant.

¶1 The sole issue as presented by the parties in this case is whether a lump-sum payment of an impairment award under the 1995 version of the Workers' Compensation Act may be discounted to present value.[(1)] The matter is one of statutory interpretation and is submitted on briefs.

Procedural History

¶2 This is the second case brought by claimant, Gerald Sharp. The first case resulted in a judgment finding him permanently totally disabled but authorizing the insurer to credit previously paid permanent partial disability benefits against its liability for permanent total disability benefits. *Sharp v. Montana Municipal Ins. Authority,* 1999 MTWCC 32. Subsequent to the judgment the insurer paid benefits as ordered, taking its credit for the previously paid partial disability benefits. However, it has since agreed to pay a "15 percent impairment award in a lump sum, subject to a discount to present value." (Respondent's Brief in Support of Present Value Reduction at 2.) Claimant wants the full 15 percent, undiscounted.

Discussion

¶3 The claimant was injured on May 22, 1997, hence his entitlement to benefits is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶4 At issue is the application of section 39-71-741, MCA (1995), which governs compromise settlements and lump-sum payments. Subsection (4) provides:

> (4) Any lump-sum conversion of benefits under this section must be converted to present value using the rate prescribed under subsection (5)(b).

The rate specified in subsection (5)(b) is "based on the average rate for United States 10-year treasury bills in the previous calendar year." § 39-71-741(5)(b), MCA (1995).

¶5 The insurer argues that lump summing of the impairment award is pursuant to sub-section (2), which governs permanent partial disability benefits. The subsection provides in relevant part:

(2) (a) Permanent partial disability benefits may be converted in whole or in part to a lump-sum payment if:

(i) an insurer has accepted initial liability for an injury; and

(ii) the claimant and the insurer agree to a lump-sum conversion.

Claimant disagrees, urging that the impairment award is not a permanent partial disability benefit and is in a benefits class of its own.

¶6 Permanent partial disability is defined in section 39-71-116(22), MCA (1995), as follows:

(22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) **is able to return to work in some capacity** but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury. [Emphasis added.]

Permanent partial disability benefits are governed by section 39-71-703, MCA (1995), which provides the following eligibility standard:

(1) **If an injured worker suffers a permanent partial disability** and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero . . . . [Emphasis added.]

The language of these sections is plain and clear, therefore they require no interpretation and must be applied as written. *State v. Dahlin,* 289 Mont. 182, 187, 961 P.2d 1247, 1250 (1998). Under the definitional section (39-71-116(22), MCA), a worker is not permanently partially disabled unless he or she is able to return to work in some capacity. A permanently totally disabled worker, who cannot return to work in any capacity, does not satisfy the requirement, does not suffer a permanent partial disability, and is not entitled to permanent partial disability benefits under section 39-71-703(1), MCA.

¶7 The insurer argues that an impairment award is nonetheless a permanent partial disability benefit subject to section 39-71-741(2), MCA, because it is one of the components in determining the amount of permanent partial disability benefits due a

claimant. But unless the claimant meets the definition of permanent partial disability, he is not entitled to permanent partial disability benefits at all. That is clearly why the legislature made a separate provision for payment of an indemnity award to claimants who suffer a rateable impairment but do not suffer a wage loss and who are consequently ineligible for permanent partial disability benefits. Section 39-71-703(2), MCA (1995), provides:

> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

Indemnity benefits under subsection (2) are a distinct class of benefits payable to impaired workers who suffer no wage loss and who are ineligible for PPD benefits. Even if the subsection (2) benefits were considered permanent partial disability benefits, claimant is ineligible under the subsection since he has suffered a wage loss.[(2)] Therefore, I conclude that the indemnity award the insurer has agreed to pay is not a permanent partial disability benefit and is not controlled by section 39-71-741(2), MCA.

¶8 The inquiry, however, is not at an end. I must still determine what authority I have, if any, to order the payment of an undiscounted amount. The Court cannot order payment of a lump sum of any sort -- with or without discount -- unless the lump sum is authorized by statute. "The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to a party that the law declares shall not be granted." *Selma Auto Mall II v. Appellate Department*, 44 Cal. App. 4th 1672, 1683-84, 52 Cal. Rptr. 2d 599 (Cal. App. 5th Dist. 1996).

¶9 Section 39-71-741, MCA (1995), authorizes lump summing in three situations.[(3)] The first is in connection with compromise settlements of disputed liability claims, § 39-71-741(1), MCA; that authority is inapplicable since this case involves accepted liability. The second is with respect to permanent partial disability benefits, § 39-71-741(2), MCA, but, as discussed above, that authority is inapplicable in this case. The third provision is with respect to permanent total disability benefits. Section 39-71-741(3), MCA, provides that up to $20,000 in permanent total disability benefits may be converted to a lump sum, however, an impairment award is not an enumerated benefit under permanent total disability benefit provisions, § 39-71-702, MCA (1995). Therefore, section 39-71-741, MCA, is inapplicable to his lump-sum request.

¶10 Escaping the strictures of section 39-71-741, MCA, however, does not aid claimant. While he has cited old law cases concerning lump summing of impairment awards, the statutes under which those cases were decided have been substantially amended. In *Franck v. National Log Construction Co.,* 241 Mont. 486, 787 P.2d 1238 (1990), the Court held that the 1985 version of section 39-71-741, MCA, did not authorize discounting of permanent partial disability benefits because the discounting provision expressly applied only to permanent **total** disability benefits. The legislature has since removed that

limitation and extended discounting to all lump sums awarded under the section. In *Ingraham v. Champion International,* 243 Mont. 42, 47, 793 P.2d 769, 772 (1990), the Court noted that permanent partial disability benefits available under the 1987 Act were "impairment awards and wage supplements." Section 39-71-703, MCA, was thereafter substantially rewritten. Moreover, while the statement that an impairment award is a component of permanent partial disability benefits is still correct, it does not contradict the statutory analysis set forth earlier.

¶11 In *Ingraham* the Supreme Court acknowledged the legislature's constitutional power "to fix the amounts, time and manner of payment of workers' compensation benefits . . ." 243 Mont. at 48, 793 P.2d at 772. This Court cannot disregard amendments enacted by the legislature subsequent to the Supreme Court cases interpreting and applying the older provisions.

¶12 Section 39-71-741, MCA (1995), is the only statutory authority for lump summing. In providing for the specific circumstances in which lump sums may be granted, the legislature has limited lump summing to those circumstances. "[A]n express mention of a certain power or authority implies the exclusion of nondescribed powers." *State ex rel. Jones v. Giles,* 168 Mont. 130, 133, 541 P.2d 355, 357 (1975). This Court cannot write in new circumstance for lump summing. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA; *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994).

¶13 I therefore hold that this Court has no statutory authority to order a lump-sum payment of an impairment award, discounted or undiscounted, to a permanently totally disabled claimant. Accordingly, the petition must be **dismissed**.

JUDGMENT

¶14 The claimant is not entitled to a lump-sum conversion, either discounted or undiscounted, of an impairment award and his petition is therefore **dismissed with prejudice**.

¶15 This JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 17th day of March, 2000.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. G. Andrew Adamek
Appendix
Submitted: January 3, 2000

APPENDIX

39-71-741. Compromise settlements and lump-sum payments. (1) (a) Benefits under this chapter may be converted in whole or in part to a lump sum:

(i) if a claimant and an insurer dispute the initial compensability of an injury; and

(ii) if the claimant and insurer agree to a settlement.

(b) The agreement is subject to department approval. The department may disapprove an agreement under this section only if there is not a reasonable dispute over compensability.

(c) Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department.

(2) (a) Permanent partial disability benefits may be converted in whole or in part to a lump-sum payment if:

(i) an insurer has accepted initial liability for an injury; and

(ii) the claimant and the insurer agree to a lump-sum conversion.

(b) The total of any lump-sum conversion in part that is awarded to a claimant prior to the claimant's final award may not exceed the anticipated award under 39-71-703.

(c) An agreement is subject to department approval. The department may disapprove an agreement only if the department determines that the lump-sum conversion amount is inadequate. If disapproved, the department shall set forth in detail the reasons for disapproval.

(d) Upon approval, a compromise and release settlement may not be reopened by the department.

(3) Permanent total disability benefits may be converted in whole or in part to a lump sum. The total of all lump-sum conversions in part that are awarded to a claimant may not exceed $20,000. A conversion may be made only upon the written application of the injured worker with the concurrence of the insurer. Approval of the lump-sum payment rests in the discretion of the department. The approval or award of a lump-sum payment by the department or court must be the exception. It may be given only if the worker has demonstrated financial need that:

(a) relates to:

(i) the necessities of life;

(ii) an accumulation of debt incurred prior to the injury; or

(iii) a self-employment venture that is considered feasible under criteria set forth by the department; or

(b) arises subsequent to the date of injury or arises because of reduced income as a result of the injury.

(4) Any lump-sum conversion of benefits under this section must be converted to present value using the rate prescribed under subsection (5)(b).

(5) (a) An insurer may recoup any lump-sum payment amortized at the rate established by the department, prorated biweekly over the projected duration of the compensation period.

(b) The rate adopted by the department must be based on the average rate for United States 10-year treasury bills in the previous calendar year.

(c) If the projected compensation period is the claimant's lifetime, the life expectancy must be determined by using the most recent table of life expectancy as published by the United States national center for health statistics.

(6) Subject to the other provisions of this section, the department shall approve or deny in writing compromise settlements and lump-sum payments agreed to by workers and insurers. The department shall directly notify a claimant of a department order approving or denying a claimant's compromise or lump-sum payment.

(7) A dispute between a claimant and an insurer regarding the conversion of biweekly payments into a lump-sum is considered a dispute, for which a mediator and the workers' compensation court have jurisdiction to make a determination. If an insurer and a claimant agree to a compromise and release settlement or a lump-sum payment but the department disapproves the agreement, the parties may request the workers' compensation court to review the department's decision.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 9, Ch. 100, L. 1919; re-en. Sec. 2926, R.C.M. 1921; re-en. Sec. 2926, R.C.M. 1935; amd. Sec. 1, Ch. 225, L. 1951; amd. Sec. 8, Ch. 234, L. 1957; amd. Sec. 2, Ch. 197, L. 1961; amd. Sec. 1, Ch. 9, L. 1975; amd. Sec. 1, Ch. 11, L. 1975; amd. Sec. 19, Ch. 23, L. 1975; R.C.M. 1947, 92-715; amd. Sec. 3, Ch. 63, L. 1979; amd. Sec. 1, Ch. 471, L. 1985; amd. Sec. 32, Ch. 464, L. 1987; amd. Sec. 64, Ch. 613, L. 1989; amd. Sec. 6, Ch. 574, L. 1991; amd. Sec. 20, Ch. 243, L. 1995.

1. A second request for a $20,000 lump-sum advance of permanent total disability benefits was voluntarily dismissed by petitioner on December 23, 1999.

2. The parties agree that claimant is entitled to an impairment award, therefore, the Court need not consider the statutory basis for such award.

3. The full text of the statute is set out as an appendix to this decision.