IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 4

WCC No. 2003-0841

PATSY SIAPERAS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 9/21/04

Summary: Claimant seeks an increase in her total disability rate based on wages paid prior to her last four pay periods. She also seeks a determination invalidating or reducing the social security offset. Finally, she seeks a lump-sum conversion of her future benefits so she can pay off her attorney and purchase an annuity which would pay her periodic benefits equivalent to her current workers' compensation benefits.

Held: Claimant is entitled to an increase in her total disability rate based on her average weekly wage as determined by her year-to-date pay as of the date of her injury. The four pay periods prior to her injury do not accurately reflect her wages. Her attacks on the social security offset are rejected, as is her request for a lump sum. Finally, the attorney lien applicable to the increase in her benefit rate applies only to prospective benefits actually paid to claimant.

Topics:

Wages: Average Weekly Wage. Where the claimant, who was injured in September 1996, received substantial quarterly bonuses on a regular basis, and those bonuses are not reflected in her last four pay periods, her year-to-date earnings should be used in computing her average weekly wage. § 39-71-123(3)(b), MCA (1995).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-123(3)(b), MCA (1995). Where the claimant, who was injured in September 1996, received substantial quarterly bonuses on a regular basis, and those bonuses are

not reflected in her last four pay periods, her year-to-date earnings should be used in computing her average weekly wage. § 39-71-123(3)(b), MCA (1995).

Benefits: Social Security Offset. The social security offset does not violate the claimant's equal protection rights and is constitutional. *McClanathan v. Smith,* 186 Mont. 56, 606 P.2d 507 (1980).

Benefits: Social Security Offset. The social security offset provisions require that the claimant's total disability benefits be reduced by one-half of the social security benefits she receives. §§ 39-71-701(5) and 39-71-702(4), MCA (1995).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-701(5), MCA (1995). The social security offset provisions require that the claimant's total disability benefits be reduced by one-half of the social security benefits received by a claimant.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-702(4), MCA (1995). The social security offset provisions require that the claimant's total disability benefits be reduced by one-half of the social security benefits received by a claimant.

Benefits: Lump Sums: Generally. Attorney fees are not a "necessity of life" for which a lump-sum advance can be made. § 39-71-741(3), MCA.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-741(3), MCA (1995). Attorney fees are not a "necessity of life" for which a lump-sum advance can be made. § 39-71-741(3), MCA.

Benefits: Lump Sums: Best Interests. Lump summing is restricted by statutes in effect at the time of a claimant's injury. Even if prior law governing lump summing were applicable, the facts in this case fail satisfy the old law criteria. Claimant failed to show that there is such a hostile relationship between herself and the insurer that benefits should be paid out in a lump sum. Lump summing merely to purchase an annuity does not overcome the presumption favoring biweekly payment of benefits.

¶1 The trial in this matter was held on December 16, 2003, in Helena, Montana. Petitioner, Patsy Siaperas (claimant), was present and represented by Mr. Robert C. Kelleher. Respondent, Montana State Fund, was represented by Mr. Charles G. Adams.

¶2 Exhibits: Exhibits 1 through 15, 17, 19 through 32, 34, and 35 were admitted without objection. Exhibits 18 and 33 were admitted over objections. Exhibit 16 was refused.

¶3 Witnesses and Depositions: Patsy Siaperas, Kevin Bartsch, James R. Porta, and Rory Siaperas testified at trial. The parties also submitted the deposition of Patrick E. Galvas, D.O. for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Final Pretrial Order are:

> ¶4a Whether the insurer is entitled to an offset calculated based upon 505 of Petitioner's Social Security benefits.
>
> ¶4b Whether § 39-71-702(4), MCA[,] is unconstitutional?
>
> ¶4c What is the Petitioner's correct average weekly wage?
>
> ¶4d Is the State Fund improperly asserting an offset per the provisions in the Social Security Ace [sic] relating to the Petitioner's average current earnings?
>
> ¶4e Is the Petitioner entitled to an award of attorney fees and costs?
>
> ¶4f Should a penalty be imposed against the Respondent?
>
> ¶4g Whether Petitioner is now entitled to an advance for attorney fees as a *necessity of life* amounting to 20% of the present value of her permanent total disability benefits which is calculated at $170,000, and which advance she can begin repaying at age 60?

(Final Pretrial Order at 2.)

In addition, claimant's attorney filed a post-trial Motion to Enforce Attorney Lien. That motion will be addressed as well.

¶5 Bench Rulings: At the close of the trial, the Court deemed the case submitted and orally ruled on several of the issues. Those rulings, restated more articulately here, were as follows:

> ¶5a Claimant's wages for the prior four pay periods do not accurately reflect the claimant's wages since she received substantial quarterly bonuses. Therefore, for purposes of computing her benefits, her average weekly wage must be recalculated using her wages and bonuses from January 1, 1996 to the date of her industrial injury.
>
> ¶5b The recomputation of benefits requires recomputation of the social security offset taken by the Montana State Fund.
>
> ¶5c The social security offset provision of the Montana Workers' Compensation Act does not provide for apportionment of the offset on account of other medical conditions which may limit a claimant's employability. Moreover, in this case there is no factual basis for such apportionment even if it were permitted.
>
> ¶5d The Montana social security offset provision is not unconstitutional.
>
> ¶5e The claimant is not entitled to lump summing of her future benefits or attorney fees.

¶5f The Montana State Fund did not act unreasonably in adjusting this claim. While the Court has determined that claimant's benefits should be recalculated based on her year-to-date wages, the information giving rise to that determination was not provided to the insurer until the eve of trial.

The above rulings are reaffirmed through the following Findings of Fact and Conclusions of Law.

¶6 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 Claimant is presently forty-two years old. She has a high school education.

¶8 On August 17, 1996, the claimant injured her low back while working for High Plains Pizza (High Plains) in Dillon, Montana.

¶9 At the time of her industrial injury, High Plains was insured by the Montana State Fund (State Fund). The State Fund accepted liability for her injury and thereafter paid medical and compensation benefits.

¶10 Claimant's benefits were based on the four pay periods prior to her injury. She was paid biweekly and her pay for each of the prior four biweekly pay periods was $1,107.69. (Ex. 13 and *see* Ex. 12 at 1.) Based on that pay, the State Fund computed her benefits based on a $553.84 average weekly wage. (Ex. 13.) It then computed her total disability rate as $369.23, which is two-thirds of $553.84. (*Id*.)

¶11 The claimant never returned to work and, with one very brief interruption early on (*see* Exs. 33-35), she has been paid total disability benefits since her injury.

¶12 Claimant had a history of back problems prior to her industrial injury, including back surgery involving a fusion at age seventeen. However, her industrial injury seriously aggravated her underlying condition, resulting in two major surgeries. (*See* Ex. 2 for a medical summary.)

¶13 Claimant's initial post-injury surgery was on February 7, 1997, and involved a "takedown" of an old, unsuccessful lumbar fusion and decompression of the L5-S1 nerve roots. (Exs. 2 at 2 and19 at 5-6.)

¶14 A second surgery was done on November 12, 1998. (Ex. 19 at 14-15.) That surgery was an L4-S1 fusion with instrumentation (rods).

¶15 A year after her second surgery, claimant was still experiencing significant back pain. Dr. Howard C. Chandler, who did the 1997 and 1999 surgeries, wrote on December 13, 1999:

> She [claimant] is a year out from her lumbar fusion and her fusion has gone onto heal nicely. She has developed a postoperative lumbar radiculitis, which I believe requires removal of her stainless steel spinal implants that were placed at the time of her surgery.

I have recommended this to Ms. Siaperas as an avenue of treatment. . . .

(Ex. 26 at 20.) In answer to questions regarding whether claimant had reached maximum medical improvement (MMI), Dr. Chandler responded:

> . . . Should Ms. Siaperas agree with this plan and decide to go forward with surgery, her date of maximum medical improvement would be approximately three months after that surgery. (*Id*.)

¶16 Based on the claimant's indication that she wished to proceed with surgery to remove the hardware, on February 28, 2002, the State Fund denied a demand by claimant's attorney for a fifteen percent impairment award. (Ex. 22.) Kevin Bartsch (Bartsch), the State Fund's claims adjuster, wrote:

> Ms. Siaperas scheduled her hardware removal surgery for April 5th. Therefore, I presume she intends to proceed with the surgery that date. In his response to Tammy Bowan's letter, Dr. Chandler indicated Ms. Siaperas is MMI without hardware removal. If she has hardware removal, she won't be MMI until 3 months after removal of the hardware. Either way, once Ms. Siaperas reaches MMI, she will have a 15% whole person impairment rating. Since Ms. Siaperas has the hardware removal surgery scheduled, she isn't MMI until approximately 3 months post removal and therefore isn't entitled to payment of the impairment benefits at this time. Barring any complications, once Ms. Siaperas has the hardware removed, reaches MMI in approximately 3 months and is determined to be permanently partially disabled, she will be eligible to receive her impairment. My assessment is she doesn't currently meet the entitlement threshold addressed in 39-71-703 since she isn't MMI.

(*Id*.)

¶17 In a prior proceeding brought by claimant for an impairment award, I "strongly urged if not directed" the State Fund to pay the 15% impairment rating based on the fact that she would have a 15% rating whether or not she underwent the surgery. My minute entry of May 22, 2002, indicates that given her pending surgery she was not at MMI at that time. The minute entry states in relevant part:

> Upon review of the above file and it appearing that there is no controversy concerning the amount of the impairment award due or which will become due claimant, the Court initiated a telephone conference call with Mr. Robert C. Kelleher, attorney for claimant, Ms. Ann E. Clark, attorney for the State Compensation Fund, and Mr. Kevin Bartsch, claims adjuster for the State Fund. Ms. Clark confirmed that there is no serious dispute over the amount of the impairment award. The concern is with when it is due. Mr. Bartsch pointed out that a doctor could give an impairment award early, essentially speculating as to what it might be. I acknowledged his concern but pointed out that cases must be evaluated on their own merits and that where, as in this case, there is no dispute over what the impairment award will be upon the claimant reaching MMI, even though MMI has not yet been achieved, then section 39-71-737, MCA, authorizes the impairment award to be paid concurrently with temporary total disability benefits. The statute expressly stated that "impairment awards . . . may be paid concurrently with other classes of benefits." It does not exempt temporary total disability benefits from those "other classes." I strongly suggested, if not directed, that the award be paid in this case since the doctor's report was unequivocal and the State Fund challenge is limited to the timing of the payment. Mr. Bartsch agreed to do so.
>
> I indicated that my evaluation of this case should not be construed as entitling every claimant receiving a pre-MMI impairment rating to payment of an impairment. Pre-MMI impairment awards are rare in this Court's experience and may well be premature, speculative, or even disputed. This case is a rare exception based upon the fact that claimant had healed up from initial back surgery ("Her date of maximum medical healing is now [January 26, 2001] if she decides not to undergo the further surgery offered her for lumbar instrumentation removal." (Contention 2, Response to Petition). The only thing precluding MMI as of January 26, 2001, was claimant's decision to have the hardware removed. Her physician, however, expressly found that the removal makes no difference as to the impairment rating: her rating is the same whether or not she decided to have the hardware removed.

Siaperas v. State Compensation Ins. Fund, WCC No. 2002-0552, May 22, 2002 Minute Entry #3230.

¶18 Actual removal of the hardware occurred on April 5, 2002, however, it does not appear that I was aware of that fact on May 22, 2002, or even that counsel were aware of the fact. In any event, on May 22, 2002, counsel and the Court understood that claimant had not reached MMI.

¶19 On October 2, 2002, Bartsch wrote claimant's treating surgeon, Dr. Howard Chandler, and asked if she were at MMI and if so if she could be scheduled for a functional capacities evaluation (FCE). (Ex. 26a.) Dr. Chandler replied, "yes" to both questions.

¶20 Pending the FCE the State Fund continued paying claimant temporary total disability benefits.

¶21 The FCE took place on February 4, 2003. (Ex. 10.) Shortly thereafter, Dr. Chandler replied to a list of questions concerning claimant's ability to work. (Exs. 29 at 1 and 26c.) The list had been prepared by a vocational consultant to determine claimant's ability to work. (*Id*.) Dr. Chandler replied that claimant was unable to work and totally disabled. (*Id*.)

¶22 On April 3, 2003, Bartsch recommended that claimant's disability status be changed to permanent total. On April 16, 2003, the State Fund notified claimant's attorney that it agreed claimant "meets the definition of permanently totally disabled" and had changed her to that status effective February 19, 2003, the date on which Dr. Chandler had disapproved her return to any work.

¶23 Meanwhile, on June 28, 2002, an administrative law judge for the Social Security Administration found the claimant totally disabled since February 6, 1997, for purposes of social security disability (SSD) benefits.

¶24 As a result of that decision, claimant received SSD benefits retroactively to December 1, 1999 at a rate of $290.74 per week. (Ex. 21.)

¶25 On April 16, 2003, the State Fund reduced claimant's benefits by $145.37, which is one-half of her weekly SSD benefits. (Ex. 21.) It also notified claimant that because of the retroactive SSD benefits paid to her, it was entitled to a retroactive offset and had therefore overpaid claimant $25,397.59. (*Id*.) Bartsch requested claimant to contact him to make arrangements to repay that amount and notified her that if she failed to do so the State Fund could suspend her benefits "for a period sufficient to recover the overpayment." (*Id*.)

¶26 On May 6, 2003, Bartsch notified claimant's attorney that there was an error in the State Fund's offset calculation. He corrected claimant's primary benefit to $938.70 per month and added auxiliary SSD benefits totaling $469.20 per month. (Ex. 25.) He recalculated the offset at $161.79 per week and reduced the claimant's workers' compensation benefits to $207.44 a week. (*Id*.) Claimant has not challenged the calculations and I have confirmed the arithmetic. Bartsch recalculated the overpayment as $28,299.17. (*Id*.)

¶27 In his letter of May 6, 2003, Bartsch reiterated the need for claimant to contact him with regard to repayment of the overpayment. He wrote:

> Please contact me to discuss recovery provisions. I'd prefer not to be in a position of suspending the benefits to make recovery."

(*Id*.)

¶28 Claimant has failed to make any arrangements for repayment of the social security overpayment. However, to date the State Fund has not suspended the claimant's benefits. For the time being, the State Fund continues to pay benefits without any reduction to recoup the overpayment. It does continue to offset one-half of the weekly amount of claimant's current SSD benefits.

Facts Pertaining to Specific Issues Raised by Claimant

I. Wages - Benefits Rate

¶29 Claimant initially claims that her average weekly wage should have been based on her pay from January 1, 1996 up to the date of her injury. She testified, and I find, that she received regular quarterly bonuses. While her pay for each of the last four pay periods was $1,107.69 on a biweekly basis, or $553.84 a week, her pay for 1996 up to September 18, 1996, was $28,445.16. Her pay for all of 1995 was approximately $35,000.00. Based on her pay for 1995 through September 18, 1996, her weekly wage was $759.99,[1] which is substantially more than her pay for the last four pay periods.

II. Apportionment Issue.

¶30 Claimant argues that since she is precluded from doing some jobs on account of non work-related conditions the social security offset should be reduced in proportion to jobs which she cannot do on account of her non work-related conditions. Her argument is without merit both legally and factually. The legal aspect is discussed later in the conclusions of law.

¶31 The two other conditions upon which claimant bases her apportionment argument are gastroesophageal reflux disease (GERD) and gallbladder surgery. The conditions and her argument are red herrings.

¶32 Claimant testified at trial that her GERD, which she has had since childhood, did not prevent her from doing her time-of-injury job. As to the gallbladder problem, there is no evidence whatsoever that it disables her from any employment. Thus, it is plain from the get-go that her disability is due to the industrial accident, not to other factors.

¶33 Indeed, the social security finding of total disability is based on her back condition, not on GERD or a gallbladder problem. (Ex. 2.) While the social security determination noted her other medical history, the disabling factors identified in the decision are all related to her back condition.

¶34 The claimant's apportionment request is based on seven job analyses which were prepared by a vocational counselor when claimant was determined unable to return to her time-of-injury job. Dr. Patrick Galvas, who was retained by claimant, reviewed the job analyses and determined that claimant was precluded from performing five of them on account of her low-back condition and two of them on account of her GERD and

gallbladder dysfunction. (*See* Galvas Dep. Ex. B and Galvas Dep.) From this, claimant and Dr. Galvas conclude that 2/7 or 29% of her disability should be assigned to the GERD and gallbladder dysfunction, and the social security offset reduced proportionately.

¶35 Logically, the analysis makes no sense. Every one of the seven job analyses was disapproved by Dr. Chandler on account of her back condition. (Ex. 8.) Moreover, as the vocational consultant testified, the seven jobs which were disapproved were just seven of many jobs that claimant is qualified for. The apportionment percentage could be manipulated merely by changing the mix of jobs to increase or diminish the number of jobs which claimant might be unable to do on account of her GERD and gallbladder condition.

III. Lump Sum

¶36 Claimant wants a lump sum to pay her attorney and to invest in an annuity. The only justification she advances in support of her requests is that her attorney wants his fees in a lump sum and she has had an uneven relationship with the State Fund. I consider these in reverse order.

¶37 Claimant testified to unhappy encounters with the State Fund. The primary encounter occurred in 1997 when Tom Fritch (Fritch), who was the adjuster at the time, terminated her benefits for a short period of time. Claimant was represented by an attorney at the time and correspondence between Fritch and the attorney show that he gave a fourteen-day notice of termination of benefits on account of the claimant's and her attorney's refusal to authorize a release of information by claimant's treating physician. (Exs. 33 and 35.) The lack of cooperation may have been a misunderstanding on the doctor's part, but the State Fund cannot be blamed for that misunderstanding. In any event, the fourteen-day notice resulted in the release of the information and claimant's benefits were immediately reinstated. (Ex. 34.)

¶38 Claimant also testified that she was told by Fritch that the State Fund could cut off her benefits for non-cooperation and that the vocational consultant and two managed care nurses made similar statements. The consultant denied making such statements, but even assuming that all the statements were made, the claimant cooperated and her benefits were never terminated except for the instance listed above.

¶39 While claimant may have been unhappy with being told that her benefits could be terminated for non-cooperation, she had a duty to cooperate with medical examinations and the collection of medical information. There is express statutory authority to cut off benefits for failure to cooperate. §§ 39-71-605(1)(b) and -607, MCA (1996).

¶40 Claimant testified that Fritch was cordial to her and that she and Bartsch, who has handled her claim for the last couple of years, get along fine.

¶41 Part of claimant's anguish may also be the result of a breakdown in communication with her lawyers. She was unaware of what transpired with respect to her cut off of benefits in 1997. More recently, the State Fund communicated its determination to reclassify claimant as permanently totally disabled to her attorney on April 16, 2003, however, she testified that her attorney did not tell her of that fact until the Saturday before trial, exactly seven (7) months later. I further note that during all of these years, she has been represented by attorneys who could have gone to bat for her if the State Fund was mistreating her.

¶42 Assuming I have the statutory authority to lump sum out benefits on account of a poor relationship between the insurer and a claimant, the claimant has failed to demonstrate that the continued receipt of biweekly benefits and a continuing relationship with the State Fund is detrimental to her mental and physical health. At present she has a good relationship with the claims adjuster. While she claims that some of the "threats" of termination of benefits for non-cooperation caused her a stomachache, to throw up, and for her back to go into spasm, there is no medical evidence showing she had any significant, continuing problems related to these complaints. Claimant has failed to show that her complaints were anything but transient and situational.

¶43 Overall, the evidence in this case does not establish the sort of hostile relationship between the claimant and the insurer which would justify conversion of future benefits to a lump sum.

¶44 Finally, the proposed annuity would simply substitute biweekly benefits from an annuity company for the benefits being paid by the State Fund. (Ex. 14.) The proposal is therefore not based on any pressing financial need. Moreover, it fails to take into consideration the full amount of the social security offset and the overpayments.

¶45 As to lump summing of attorney fees, claimant urges that they are a "necessity of life." While attorneys are sometimes necessary, they and their fees are **not** a "necessity of life" as that term is understood in ordinary usage. Necessities of life are food and shelter, medical care, and similar things.

IV. Reasonableness Issue

¶46 The State Fund's determination of the claimant's wages and her benefit rate was reasonable. The First Report of Injury listed her wages for the last four pay periods and those wages were in fact used. (*See* Ex. 31.) There is no evidence that the State Fund had information that claimant's last four pay periods were unrepresentative of her usual wage. While claimant produced a pay summary for the period ending November 18, 1996, which listed her year-to-date earnings as $28,445.16, there is no evidence that the State Fund was ever furnished the document, or that it was furnished with a 1995 W-2, until just prior to the trial in this case. In light of the uncontroverted information as to the claimant's pay

for the last four pay periods, the State Fund did not have a duty to investigate further. It reasonably relied on the claimant's reported wages for the previous four pay periods. Claimant could have brought information regarding bonuses to the State Funds' attention, but failed to do so.

¶47 I also note that claimant has been represented by an attorney since at least September of 1997. Until the eve of trial, neither she nor her attorneys notified the State Fund that her last four pay periods were unrepresentative of her wages. The contention that the State Fund was unreasonable is not only without merit, it is frivolous.

¶48 I can find no other basis for finding the State Fund's adjustment of this claim unreasonable with respect to the issues raised in this case.

CONCLUSIONS OF LAW

¶49 This case is governed by the 1995 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶50 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶51 Benefits are based on the worker's average weekly wage, which must be computed pursuant to section 39-71-123(3)(a), MCA (1995), which provides:

> (3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.
>
> (b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

As set forth in subsection (3)(b), the four pay period rule can be disregarded only if there is good cause, i.e., if those pay periods do "not accurately reflect the claimant's employment history." I read "employment history" to mean wage history since the provision specifically concerns wages.

¶52 Bonuses are wages. § 39-71-123(1)(a), MCA.[(2)] Based on the information furnished at trial I find and conclude that claimant's last four pay periods were not representative of her earnings since it disregarded substantial bonuses she regularly received. Her wage must therefore be calculated based on her 1996 earnings to date as of the date of her injury. Accordingly, $759.99 is the wage which must be used in calculating her benefits.

¶53 The rate for total disability benefits is determined by multiplying the claimant's average weekly wage by two-thirds (2/3), subject to a maximum which is equal to the "state's average weekly wage at the time of injury." §§ 39-71-701(3) and -702(3), MCA (1995). The State's average weekly wage on the date of the claimant's injury was $384.00. Since that is less than two-thirds of $759.99, the $384.00 is her TTD and PTD weekly benefit rate. This increases her benefits by $14.77 ($384.00 less $369.23) weekly. The State Fund shall recalculate her benefits retroactively and prospectively based on that rate. The retroactive increase shall be credited against the overpayment.

¶54 The claimant challenges the constitutionality of the social security offset. The offset is authorized in section 39-71-701(5), MCA (1995), with respect to temporary total disability benefits and section 39-71-702(4), MCA (1995), with respect to permanent total disability benefits. Section 39-71-701(5) provides:

> (5) In cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.

Section 39-71-702(4) provides:

> (4) In cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.

¶55 Claimant argues that the social security offset violates her right to equal protection of the laws. An equal protection challenge to the offset was rejected in *McClanathan v. Smith,* 186 Mont. 56, 606 P.2d 507(1980). The Court held that the fifty percent offset provision is reasonably related to a legitimate state interest in avoiding duplication or overlapping of disability benefits.

> ¶56 The claimant, however, urges that this Court should hold the offset unconstitutional under the Equal Protection Clause because twenty-one states do not authorize an offset. (Claimant's Proposed Findings of Fact, Conclusions of Law & Order at 2-3.) The fact that other states may not authorize the offset is irrelevant to

> equal protection concerns. The Equal Protection Clause of the United States Constitution (Amendment 14), and of the Montana Constitution, Art. II, § 16, do not require uniformity of state laws. Indeed, part of the genius of our federal system of government is to allow states to adopt their own laws and try different approaches and solutions to similar problems. Under equal protection analysis, the question to be answered as to any state law is **not** whether it conforms to the laws of other states, but whether it is "supported by a rational basis," *McClanathan*, 186 Mont. 56 at 66, 606 P.2d at 512.

¶57 Claimant further argues that the social security offset should be reduced by 2/7ths since a physician retained by her concluded that two of seven jobs identified by a vocational consultant as jobs she is qualified to do should be excluded because of physical conditions unrelated to her industrial injury (GERD and a gallbladder problem). I have found as a matter of fact that the argument is factually specious.

¶58 The argument is also without any legal basis. The offset provisions do not permit apportionment. As held in *Watson v. Seekins,* 234 Mont. 309, 763 P.2d 328 (1988), the offset provisions do **not** allow proration:

> Everyone is in agreement that under the Montana statute where federal disability benefits are awarded, state setoff occurs. The dispute is how much disability pay should be used to compute setoff: all of it or only part of it. The statute simply does not allow for Watson's formula to exclude a part of the entire award. The words are not there. The role of the Court is not to insert what has been omitted by the statute. Had the legislature intended an exemption, exclusion, or any other formula to apply to reduce the amount subject to setoff, it is reasonable to assume that it would have expressed it in the statute.

234 Mont. at 315, 763 P.2d at 332 (citations omitted).

¶59 Citing 42 USC § 424a(a) and federal regulations, claimant also argues that the State Fund cannot reduce her total benefits below eighty percent of her average current earnings after crediting her for attorney fees and expenses. Using her year-to-date earnings as of the date of her industrial injury, she argues that her total benefits (social security disability benefits plus workers' compensation benefits) cannot be less than eighty percent of $762.60 per week, or $610.00 a week. Her arithmetic is slightly faulty. As set out in paragraph 28, her average weekly wage was $759.99, eighty percent of which is $607.99. After reduction for the social security offset the total of her Montana workers' compensation benefits is $498.18 ($290.74 in workers' compensation benefits and $207.44 in social security disability benefits, weekly).

¶60 Even with the corrected arithmetic, claimant's total benefits are less than eighty percent of her average weekly wage or current earnings. However, claimant misreads the

federal statute. 42 USC § 424a applies only to the amount of **social security disability benefits** payable **if** the state law does **not** allow for an offset. The provision is discussed in *McClanathan*, 186 Mont. at 63-64, 606 P.2d at 511:

> The federal law also provides in 42 U.S.C. § 424a that where an individual receives disability benefits under the Social Security program, and provides payments for such disability under a Workers' Compensation program, his disability benefits may be reduced so his total benefits amount to 80% of his "average current earnings" under the Social Security Act. The same section also provides however, that the federal government will not offset Workers' Compensation benefits in these circumstances:
>
> > "(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title."

I have reviewed 42 USC § 424a, and it indeed provides for a reduction of **social security benefits** in the event a claimant's social security benefits plus workers' compensation benefits exceed a specified threshold. It does **not** limit the state offset. The relevant part of 42 USC § 424a is quoted in the appendix. I note that, as with many federal statutes, it is difficult to read.

¶61 I therefore hold that the State Fund has properly reduced claimant's benefits by one-half of her social security disability benefits.

¶62 Under both section 39-71-701 and -702, MCA (1995), the State Fund is entitled to recoup overpayments resulting from the social security disability award, indeed it is authorized to suspend claimant's benefits in their entirety to effect the recoupment. Section 39-71-701(6), MCA (1995), provides:

> (6) If the claimant is awarded social security benefits, the insurer may, upon notification of the claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from agreeing to a repayment plan.

Section 39-71-702(7), MCA (1995), provides:

> (7) If the claimant is awarded social security benefits, the insurer may, upon notification of the claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to recover any resulting overpayment

of benefits. This subsection does not prevent a claimant and insurer from agreeing to a repayment plan.

To date the State Fund has continued to pay claimant biweekly benefits despite her refusal to enter into negotiations to arrange a repayment plan. It would behoove her and her attorney to pay heed to the quoted provisions and enter into negotiations to repay the overpayments.

¶63 I next consider the claimant's request for a lump sum. She proposes a lump sum to pay her attorney fees and a lump sum which would provide her a life-time annuity of periodic benefits equivalent to her prospective workers' compensation benefits.

¶64 Lump sum settlements are governed by section 39-71-741, MCA (1995). In relevant part, the section provides:

> **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.
>
> . . .
>
> (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.

¶65 The section requires that any lump-sum request be submitted to the Department in the first instance. While the Court has jurisdiction of a dispute if the Department rejects a settlement, § 39-71-2401(2) and (3), MCA,[(3)] and inherent original jurisdiction over settlements reached in litigation pending before it, it does not have jurisdiction to consider lump-sum requests which meet neither of the above requirements. No settlement agreement was submitted to the Court or the Department in this case. Indeed, there is no evidence that the plan the claimant requests the Court to approve was ever submitted to the State Fund. Thus, at first glance it appears the Court does not have jurisdiction over the lump-sum request. However, the State Fund in its response to the claimant's lump-sum request indicates it will be rejected in any event. I therefore deem the request as rejected and consider the merits of the request.

¶66 On the merits, the request must be denied. Section 39-71-741(3), MCA (1995), requires that any lump-sum request relate to necessities of life, debt incurred prior to injury, a feasible self-employment venture, or debt incurred post-injury which arises as a result of the claimant's reduced income. None of these criteria are met. As found in paragraph 44, attorney fees are not a "necessity of life." The substitution of an annuity for the State Fund's liability for biweekly benefits also fails to satisfy any of the statutory conditions.

¶67 The lump-sum request fails even if considered under the more general "best interests" test applicable to lump summing under pre-1987 statutes. Even under pre-1987 law, lump sums were exceptions to biweekly payment of benefits. *Sullivan v. Aetna Live & Casualty,* 271 Mont. 12, 894 P.2d 278, 281 (1995). In *Sullivan* the Court summarized its prior holdings concerning the best interests rule as follows:

> These cases indicate that the claimant's best interest is the primary factor to be considered when evaluating lump sum settlements. Where appropriate, courts should also consider outstanding indebtedness and pressing need but these are to be components of the best interest analysis. Considering that debt is a significant part of our society, including home mortgage, credit card, medical expenses, and student or farm loans, it is unrealistic to conclude that outstanding debt alone is sufficient grounds to grant a lump sum settlement. Were that the case, most claimants could get lump sum settlements on demand. This would be contrary to the express policy that regular payments are the rule rather than the exception. Landeen, 277 P. at 617. Similarly, pressing need, considered alone, is particularly subjective and ignores the consequences of granting a lump sum settlement. The best interest test embraces all factors, including outstanding debt and pressing need.

271 Mont. at 18. The request in this case is not based on debt or pressing need. It is based on claimant's view that it would be better for her not to have to deal with the State Fund in the future. But there is not a scintilla of evidence that a lump sum would alleviate any significant mental health problems. *Compare Reinhard v. Missoula Sheet Metal,* 240 Mont. 370, 373, 784 P.2d 398, 400 (1989). And, the evidence at trial shows that claimant has a cordial and satisfactory relationship with the current adjuster.

¶68 I next address the Motion to Enforce Attorney Lien filed post-trial by the claimant's attorney. In that notice, the attorney states that he is entitled to a lien based on the difference between the benefits as determined by the State Fund and the benefits as determined by the Court. I agree, however, two issues remain. First, does the lien apply to the raw increase in claimant's permanent total disability rate or only to the net after the offset? Second, how can the attorney fee due with respect to retrospective benefits be enforced in light of the State Fund's overpayment to claimant and its entitlement to recoup the overpayment?

¶69 Claimant's attorney is entitled to a fee **only** on the additional benefits he has secured for the claimant. He secured the claimant an additional $14.77 per week. However, claimant is obligated to repay the State Fund for a substantial overpayment resulting from the award of social security disability benefits. While I make no final determination as the retrospective benefit to claimant, it is approximately $5,000.00,[(4)] thus there is still an overpayment in excess of $20,000.00. Thus, there are no retrospective monies owed by the State Fund to which the lien can attach and any future payments may be reduced by the remaining offset.

¶70 I therefore determine that the lien applies only to **future** payments and authorize the State Fund to deduct $5.91 (*$14.77 x 2 x 20%*)[(5)] from claimant's future biweekly benefits and send that amount directly to her attorney. Claimant's attorney will have to seek payment of his fees on the $5,000.00 directly from claimant.

¶71 In authorizing the deduction from future payments, I make no determination concerning the amount of the overpayment to claimant or the manner in which it may be recovered. As I noted earlier, the social security offset provisions permit the State Fund to cut off all benefits until the overpayment is repaid in full. If benefits are terminated to recover the overpayment, there will be nothing from which to deduct the attorney fees. The lien attaches only to future benefits actually paid.

¶72 Claimant in her Motion to Enforce Attorney Lien requests prejudgment interest with respect to attorney fees. Since I have determined that the lien applies only to prospective payments, there is no basis for awarding interest.

¶73 Claimant's request for an award of attorney fees and penalty are denied. Both require proof that the insurer acted unreasonably with respect to the payment of benefits. §§ 39-71-611, -612, 2907, MCA (1995). Such proof is utterly lacking in this case.

JUDGMENT

¶74 Claimant is entitled to a retrospective and prospective increase in her total disability benefits in the sum of $14.77 per week. Since the State Fund has a claim for reimbursement of overpayments resulting from social security disability benefits awarded to claimant, and since the overpayment exceeds the amount due claimant on account of the retrospective increase in benefits, the retrospective portion of the increase in benefits shall be applied to reduce the amount of the overpayment.

¶75 The Court retains jurisdiction to determine the amount by which the overpayment shall be reduced should the parties be unable to do the arithmetic.

¶76 The attorney fee lien attaches only to prospective benefits actually paid since the State Fund owes claimant nothing retrospectively and claimant owes the State Fund for a substantial overpayment. The Court reiterates its suggestion to claimant that she enter into negotiations with the State Fund to repay the overpayment lest her biweekly benefits be cut off entirely.

¶77 Claimant is entitled to her costs with respect to the wage issue. She shall file a memorandum of costs in accordance with Court rules.

¶78 All other claims and issues raised in the pretrial order are **dismissed with prejudice.**

¶79 This JUDGMENT is certified as final for appeal.

¶80 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 15th day of January, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert C. Kelleher
Mr. Charles G. Adams
Submitted: December 16, 2003

APPENDIX

42 USC § 424a

§ 424a. Reduction of disability benefits. (a) Conditions for reduction; computation. If for any month prior to the month in which an individual attains the age of 65-

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month to--

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in section 418(g) of this title), other than (i) benefits payable under Title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 418 of this title, and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 410 of this title, the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans, exceeds the higher of--

(5) 80 per centum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of-

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 415(b) of this title as in effect prior to January 1979) used for purposes of computing his benefits under section 423 of this title, (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 423(d) of this title) and the five years preceding that year.

(b) Reduction where benefits payable on other than monthly basis. If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) of this section is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reductions and deductions under other provisions. Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title, but before deductions under such section and under section 422(b) of this title.

(d) Exception. The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment

income of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

(e) Conditions for payment. If it appears to the Commissioner of Social Security that an individual may be eligible for periodic benefits under a law or plan which would give rise to reduction under this section, the Commissioner may require, as a condition of certification for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Commissioner of Social Security may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

. . . .

1. September 18th is the 262nd day of the year in a leap year, thus 37.423 weeks had expired by that date. Dividing those number of weeks into her year-to-date pay yields $759.99 per week.

2. Section 39-71-123(1)(a), MCA (1995), provides in relevant part:

39-71-123. Wages defined. (1) "Wages" means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee, or income provided for in subsection (1)(d). Wages include but are not limited to:

(a) commissions, **bonuses**, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods . . . . [Emphasis added.]

3. Section 39-71-2401, MCA (2001-2003), provides in relevant part:

(2) A dispute arising under this chapter that does not concern benefits or a dispute for which a specific provision of this chapter gives the department jurisdiction must be brought before the department.

(3) An appeal from a department order may be made to the workers' compensation court.

4. I multiplied the approximate six years three months (338 weeks) times $14.77, which equals $4,992.26.

5. The State Fund filed a response in opposition to the lien based on the overpayment. However, it did not dispute the twenty percent amount asserted by claimant's attorney as the amount of his fee under his agreement with the claimant.