IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 50

WCC No. 2000-0254

SUZANNE SWARTZ

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CARMIKE WESTWYNN THEATRES

Employer.

SUMMARY JUDGMENT

Summary: Claimant, who is permanently totally disabled, was told by the State Fund that she is entitled to a 20% impairment award. Later on the State Fund reneged and asserted that impairment awards are not payable to permanently totally disabled claimants.

Held: *Fisch and Rausch,* 2000 MTWCC 56 and 2001 MTWCC 15, which held that impairment awards are not payable to permanently totally disabled claimants and that the denial of the award is not unconstitutional, are reaffirmed. However, the State Fund waived its right to contest the impairment award in this case by admitting liability for the award. Since impairment awards can be paid concurrently, and the total award has accrued since claimant reached maximum medical healing, it is payable now.

Topics:

> **Estoppel and Waiver: Waiver.** Where an insurer admitted liability for an impairment award to a permanently totally disabled claimant and promised to pay it in the future, it waived any right it had to contest the statutory entitlement of the claimant to the award.

¶1 Petitioner, who is permanently totally disabled, is seeking payment of an impairment award. She now moves for summary judgment.

Facts

¶2 The parties have agreed that the following facts are undisputed for purposes of the summary judgment motion:

> 1. On October 21, 1993, Ms. Swartz was injured in the course and scope of her employment with Carmike Westwynn Theatres. The accident which caused her injury occurred at her employer's place of business in Great Falls, Cascade County, Montana. At the time of the accident, the State Fund provided workers' compensation insurance to Ms. Swartz's employer.
>
> 2. Ms. Swartz subsequently filed a claim for workers' compensation benefits, and the State Fund accepted liability.
>
> 3. Ms. Swartz is permanently totally disabled as a result of her October 21, 1993 injury.
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> 4. On December 8, 1994, the State Fund concurred with and joined in a Petition for Lump Sum Advance of permanent partial disability benefits. At that time, the State Fund conceded that Ms. Swartz would be entitled to an impairment award in the future and agreed to pay $4,000 in a lump sum advance. The Department of Labor and Industry approved the Petition for Lump Sum Advance on December 14, 1994, and the State Fund subsequently paid $4,000 to Ms. Swartz. The State Fund also agreed in a letter dated November 20, 1998 that [M]s. Swartz would be entitled to an impairment award. (See Exhibit "A").
>
> 5. On or around June 11, 1997, Dr. Ronald Peterson determined that Ms. Swartz had attained maximum healing and assigned a 20% whole person impairment rating to Ms. Swartz because of her work related injury.
>
> 6. Under the 1993 Workers' Compensation Act, if the Court finds that Ms. Swartz is entitled to an impairment award, her award should be $12,670, of which $8,670 remains due.

(Brief in Support of Motion for Summary Judgment at 2.)

¶3 Exhibit A, to which the parties refer in their fourth uncontested fact (¶ 2), is a November 20, 1998 letter written by a State Compensation Insurance Fund (State Fund) claims adjuster to claimant's attorney.[(1)] The text of the letter indicates that by that time the claimant had been declared permanently totally disabled. It addresses claimant's entitlement to an impairment award in light of that declaration:

> The State Fund rejects your demand that impairment benefits be paid made to Ms. Swartz based on the 20% permanent partial impairment assigned by Dr. Peterson on July 11, 1997. As of that date, Dr. Peterson had not indicated that Ms. Swartz was able to return to competitive employment. Your letters of July 18, 1997 and July 22, 1997 state your position that Ms. Swartz was permanently totally disabled, and had

> been so since February 28, 1994. The State Fund continued to pay total temporary disability benefits to Ms. Swartz until her benefit status was changed to permanent total disability, as I indicated to you in my letter of May 7, 1998.
>
> Section 39-71-703 states that an injured worker is entitled to a permanent partial disability award if that worker is no longer entitled to temporary total or permanent total disability benefits. Ms. Swartz has been entitled to, and in fact has received, either temporary total or permanent total disability benefits without interruption since March 8, 1994. **Ms. Swartz will be entitled to payment of permanent partial disability benefits based on her impairment when she reaches Social Security retirement age at 66 years and 8 months.** The State Fund will recover the lump sum advance of $4,000 from impairment benefits payable at that time.

(Ex. A at 2, emphasis added.)

Discussion

¶4 Claimant is seeking immediate payment of an impairment award. She argues that she is statutorily entitled to the award now, not later. Secondarily, she argues that if the statutes do not entitle her to an immediate award then they are unconstitutional. Finally, she argues that the State Fund has waived any right to contest an award.

¶5 In *Fisch v. State Fund,* 2000 MTWCC 56, this Court held that permanently totally disabled workers who have never been in permanent partial disability status are not entitled to impairment awards under the 1991 and 1997 versions of the Workers' Compensation Act. The present claim arises under the 1993 version of the Act since claimant's injury occurred October 21, 1993. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Since the 1993 version of the applicable statutes are identical to the 1991 statutes, *Fisch* is controlling.

¶6 Claimant argues that *Fisch* was wrongly decided but her arguments only reaffirm my belief in the correctness of the decision.

¶7 Initially, she urges that the first sentence of section 39-71-703, MCA (1991-93), provides for impairment awards for permanently totally disabled workers. She says that any other reading would render the reference to "permanent total disability benefits" meaningless. Her arguments are without merit. Her interpretation omits and ignores the reference in the sentence to "permanent **partial** disability." The sentence reads:

> (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. [Emphasis added.]

This sentence is very simple to understand. The first condition of entitlement is that the worker "suffers a permanent partial disability." The second condition is that she **also** "is no

longer entitled to temporary total or permanent total disability benefits." It is claimant's construction which would render part of the sentence meaningless by ignoring the requirement that the worker be permanently partially disabled.

¶8 Next, claimant argues that section 39-71-737, MCA (1993), authorizes impairment awards to permanently totally disabled workers. I rejected that argument in *Fisch*, and reject it here. As I said in *Fisch* the section provides for "when" concurrent benefits may be paid; it does not create an entitlement to any new benefits not authorized elsewhere. *Fisch,* ¶ 19.

¶9 Next, claimant argues that section 39-71-710, MCA (1993), entitles claimant to an impairment award. She says that such construction is consistent with prior Supreme Court decisions construing the section. But the section has been substantially amended since the cited decisions and must be construed as it was written in 1993. Like section 39-71-737, MCA, it does not create entitlement to any new benefits, it merely provides that benefits created elsewhere cease upon retirement. The arguments made by claimant here are a rehashing of the arguments made and fully considered in *Fisch*.

¶10 Claimant further argues that section 39-71-710, MCA (1993), which provides for termination of permanent total disability benefits upon reaching age 65, is unconstitutional. Insofar as she may be claiming that the section cuts off an impairment award to which she is otherwise entitled, it does not; I have already found that she is not entitled to the impairment award at any time. Insofar as she is attempting to challenge the section's provision for termination of permanent total disability benefits upon reaching retirement age, that challenge is premature: Claimant may not reach that age or may not be totally disabled at that age due to improvement in her condition, medical advances, or additional education. Moreover, the issue is not raised in the petition.

¶11 She then argues that denial of impairment awards to permanently totally disabled workers violates both equal protection and substantive due process guarantees. She cites no cases and, in any event, I fully considered and rejected those challenges in *Rausch v. State Compensation Ins. Fund,* 2001 MTWCC 15. Claimant has not provided any new argument which would warrant reconsideration of that decision.

¶12 Finally, claimant urges that the State Fund has waived its right to contest the claimant's entitlement to an impairment award, hence all the statutory construction and constitutional arguments are beside the point. Finally, on that point, the Court agrees.

¶13 "Waiver is an equitable doctrine, applicable when there is an intentional or voluntary relinquishment of a known right, claim or privilege, or such conduct as warrants an inference of the relinquishment of such right." *Sperry v. Montana State University,* 239 Mont. 25, 30, 778 P.2d 895, 898 (1989). Claimant urges that the State Fund's November 20, 1998 letter constitutes a waiver of any right to contest payment of an impairment award. I agree.

At the time of the letter the State Fund was aware that claimant was permanently totally disabled. Its statement that she was nonetheless entitled to an impairment award was unequivocal. It had the right to contest claimant's entitlement if it believed there was any possible ground to do so, or even to reserve judgment on the matter. It was apparently confident in its reading and did neither.

¶14 This case is similar in some respects to *Ryles v. Springhill Ranch Eggs,* 247 Mont. 276, 806 P.2d 525 (1991), where claimant, who was employed in a family business organized as a close corporation, continued working part time following his injury but was paid benefits. His benefit rate was the same for total and partial disabilities. The State Fund later attempted to characterize those benefits as permanent partial benefits. Meanwhile, for the time period in question, the State Fund had credited the corporation for premiums it paid with respect to claimant during the period in question, thus indicating that claimant had no earnings during the period. Based on these facts, the Supreme Court held "that the State Fund is estopped from denying liability for temporary total disability benefits during period A [the period in question]." 247 Mont. at 282, 806 P.2d at 529. While the holding is couched in terms of estoppel, the Court did not articulate and apply the traditional tests for estoppel. Its determination appears more compatible with the doctrine of waiver.

¶15 Since the claimant is entitled to an impairment award, she is entitled to it now. Section 39-71-737, MCA, expressly provides that impairment awards "may be paid concurrently with other classes of benefits." The award became payable when claimant reached maximum medical improvement on June 11, 1997. Over 200 weeks have now elapsed since that time. This amounts to more than the 20% award,[(2)] therefore the full balance of $8,670 has accrued and should be paid in a lump sum.

ORDER

¶16 The claimant is entitled to a 20% impairment award amounting to $12,670, of which amount $4,000 has been paid. The sum of $8,670 remains due and the State Fund shall pay that balance in a lump sum.

¶17 Claimant is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

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

¶19 Any party to this dispute may have 20 days in which to request reconsideration from this Summary Judgment.

DATED in Helena, Montana, this 28th day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. David A. Hawkins
Submitted: March 30, 2001

1. The identity of the claims adjuster is not disclosed as the last page of the letter is missing from the exhibit tendered to the Court, however, claimant indicates it was Linda Robbins. (Petitioner's Reply Brief in Support of Motion for Summary Judgment at 2.) In any event, the identity of the adjuster is immaterial.

2. Twenty percent of 350 weeks is 70 weeks.