

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9212-6666

BRIAN WRAY

Petitioner

vs.

STATE COMPENSATION INSURANCE

FUND/HARP LINE CONSTRUCTION COMPANY

Defendant/Employer.

**ORDER ADOPTING FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
HEARING EXAMINER AND ENTERING JUDGMENT**

The above-entitled matter was duly heard by Court-appointed Hearing Examiner, ROBERT J. CAMPBELL who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above- captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Defendant is entitled to continue recouping the sum of \$39.95 from claimant's current bi-weekly benefits. Defendant is further entitled to reduce the claimant's bi-weekly benefits by the additional sum of \$17.32 per week, to recoup the overpayment resulting from the payment of auxiliary social security disability benefits not previously reported to the defendant.

3. Defendant was reasonable in the payment of claimant's benefits and claimant is not entitled to a penalty pursuant to Section 39-71-2907, MCA.

4. Claimant is not entitled to attorney fees and costs.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 26th day of October, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9212-6666

BRIAN WRAY

Petitioner

vs.

STATE COMPENSATION INSURANCE

FUND/HARP LINE CONSTRUCTION COMPANY

Defendant/Employer.

Presiding Hearing Examiner: ROBERT J. CAMPBELL

Counsel of Record:

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ON BEHALF OF THE PETITIONER

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ON BEHALF OF THE DEFENDANT/EMPLOYER

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND PROPOSED JUDGMENT

1. Claimant filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.
2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.
3. A pretrial conference was conducted on January 28, 1993, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on May 12, 1993. Pertinent parts of the Pretrial Order are as follows:

I. STATEMENT OF JURISDICTION

The Workers' Compensation Court has jurisdiction in this matter pursuant to M.C.A. Section 39-71-2905. (1981)

....

III. STATEMENT OF UNCONTESTED FACTS

- A. On December 5, 1985, the Claimant suffered an industrial injury arising out of and in the course of his employment with Harp Line Construction Company, in Kalispell, Flathead County, Montana. The Claimant injured his cervical back when he suffered a blow to the head while climbing onto earth moving equipment he was preparing to operate. The Claimant has undergone surgery and has received medical care since the accident.
- B. That at the time of the injury, the Employer was enrolled under Compensation Plan No. 3 of the Workers' Compensation Act.

C. A dispute has arisen between the Claimant and the Defendant regarding the recoupment by the State Fund of lump sum advances paid to the Claimant and the termination of authorization for chiropractic treatment and for medication. The parties have made an effort to resolve this dispute but have been unable to do so, therefore a dispute exists which requires resolution by this Court.

4. The parties have proposed and the Court adopts the following issues to be decided by the Court:

A. Whether the Claimant is entitled to reinstatement of his full total disability benefits pursuant to MCA Section 39-71-702 (1985).

B. Whether the Defendant is liable for medical expenses for chiropractic treatment and medication, pursuant to MCA Section 39-71-704 (1985). [WITHDRAWN.]

C. Whether the Claimant is entitled to costs and attorney fees, pursuant to MCA Section 39-71-611 and/or -612 (1985).

D. Whether the Claimant is entitled to an increase in his award for unreasonable refusal to pay full temporary total and medical benefits pursuant to MCA Section 39-71-2907 (1985).

5. The trial in this matter came on May 24, 1993, before Hearing Examiner Robert J. Campbell. Claimant, Brian Wray and Willem Visser were sworn and testified. Exhibit Nos. 1 through No. 15 were admitted into evidence by stipulation of the parties. No depositions were taken by either party. At trial, claimant stipulated that the defendant was entitled to recoup the overpayment of bi-weekly disability benefits resulting from an award to the claimant of social security disability benefits. As a result of the claimant's social security disability award, claimant received an overpayment of \$12,878.44. Upon filing of the proposed findings of fact, conclusions of law and reply briefs, this matter was deemed submitted on July 22, 1993.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Proposed Judgment:

FINDINGS OF FACT

1. The uncontested facts are found as fact and adopted as fact.

Claimant

2. At the time of trial, claimant was 52 years old (DOB: September 11, 1940), married with no children living at home.

3. Claimant suffered an industrial injury on December 5, 1985 when he received a neck injury and he has been totally disabled since that time. (Ex. No. 1.)
4. In addition to his workers' compensation benefits, claimant has been receiving social security disability benefits since March, 1987. (Ex. No. 10.)
5. Claimant's temporary total disability rate was \$266.66. On February 26, 1990, the claimant received an award of social security disability benefits retroactive to March, 1987. As a result of this award, his temporary total disability rate was reduced, pursuant to the provisions of the Workers' Compensation Act to \$193.01, effective July 8, 1990. As a result of the social security disability award, the defendant is entitled to recoup an overpayment of prior benefits in the amount of \$12,878.44. (Ex. No. 10.)
6. In July, 1990, the defendant, State Fund, notified the claimant he was considered permanently totally disabled. (Tr. at 34.) Claimant's permanent partial disability rate is \$146.50 and his permanent total benefit wage less the social security offset is \$193.01 per week. (Ex. No. 1.)

Prior Lump Sum Advances

7. Claimant has petitioned the Montana Department of Labor and Industry ("Department") with the concurrence of the defendant, State Fund, for the following partial lump sum advance payments:
 - a. On December 30, 1987, the Department approved and the State Fund paid a partial lump sum advance in the amount of \$8,725.54. (Ex. No. 4.)
 - b. On June 17, 1988, the Department approved and the State Fund paid a partial lump sum advance in the amount of \$400.00. (Ex. No. 5.)
 - c. On April 10, 1989, the Department approved and the State Fund paid a partial lump sum advance in the amount of \$5,545.89. (Ex. No. 6.)
 - d. On January 14, 1992, the Department approved a partial lump sum advance in the amount of \$13,347.50. (Ex. No. 9.) Claimant returned this advance after learning that it was the intention of the State Fund to recoup such benefits at the rate of \$58.27 per week. Claimant returned the check because he could do better by going to a bank. (Tr. at 6.)
8. At the time of the advances in 1987, 1988 and 1989, the State Fund believed that claimant would ultimately be determined to be permanently partially disabled and therefore anticipated recoupment of the advances from permanent partial disability benefits. It was not until 1990, when it learned claimant had been awarded social security disability benefits, that the State Fund learned claimant might be permanently totally disabled.

Recoupment

9. On June 22, 1992, the defendant advised the claimant that it was initiating the recoupment of his prior lump sum advances and social security overpayment. (Ex. No. 10.) Claimant's lump sum advances totaled \$14,671.43.

10. When claimant petitioned for the first three lump sum advances he understood from his lawyer that the advances would be recouped from the 500 weeks of permanent partial benefits he would receive after the age of 65 rather than from his current bi-weekly benefits. (Tr. at 5.) There was no written agreement on recoupment.

11. On February 13, 1989, defendant, State Fund, advised claimant that since the two previous advances in the amount of \$9,125.54 had been within the well documented 18 percent impairment rating to which the claimant was entitled, the State Fund would consider an additional lump sum of up to \$4,059.46, which was the remaining amount of the impairment award after subtracting previous lump sum advances. Shortly thereafter, the State Fund concurred in the petition for the third lump sum advance in the amount of \$5,545.89, which was approved by the Department. (Ex. No. 6.)

12. On June 22, 1992, the State Fund notified the claimant it would reduce his benefits by an additional \$39.95 per week to recoup an overpayment of benefits for the previous lump sum advances as well as the social security overpayment. (Tr. at 41; Ex. No. 6.)

13. State Fund claim manager, Willem Visser testified that the following factors were considered in setting the recoupment amount at \$39.95 per week:

a. The claimant's age of 52;

b. The fact that claimant had previously submitted six lump sum advance petitions and it was likely he would submit more;

c. Claimant has a history of health problems (hypertension and chest pains) in addition to his industrial injury. (Ex. No. 3.);

d. The amount of defendant's recoupment entitlement included:

i. Prior lump sum advances of \$14,671.43;

ii. Social security overpayment of \$12,878.44;

iii. Social security overpayment - auxiliary benefits - of approximately \$7,000.00. (Tr. at 35-40, 51-52.)

14. Mr. Visser testified that considering the above factors a recoupment plan was necessary to provide the defendant with a reasonable expectation of recovery. The recoupment amount of \$39.95 per week was calculated at zero percent interest. It was based upon the number of weeks until claimant's 65th birthday and designed to recoup the

social security overpayment (not including the auxiliary overpayment) and prior lump sum advances. (Tr. at 52.)

15. At trial claimant disclosed for the first time that he had also received auxiliary social security benefits which resulted in an additional overpayment of \$11,029.52. Recoupment of this amount is requested in the amount of \$17.32 per week.

16. Claimant testified that his current monthly income after recoupment of \$39.95 is \$612.24 from workers' compensation plus social security of \$724.00 per month. Petitioner's total income of \$1,336.24 per month less expenses of \$1,201.89 leaves a monthly surplus of \$134.35. (Defendant's Finding of Fact No. 20.)

17. Claimant testified that he owns his home and three and a half acres valued at \$185,000.00 but would like to make repairs of \$14,000.00. (Tr. at 14-15.)

18. Without recoupment claimant's current monthly income from his workers' compensation benefits and social security disability is approximately \$1376.19. (Tr. at 21; Ex. 10.) With a recoupment of \$57.27 (\$39.95 plus \$17.32) claimant's income is \$1318.19 per month, leaving him a surplus after paying his \$1,201.89 monthly expenses even without considering his wife's social security income.

CONCLUSIONS OF LAW

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

2. Defendant is entitled to continue recouping the sum of \$39.95 from claimant's current bi-weekly benefits. Defendant is further entitled to reduce the claimant's bi-weekly benefits by the additional sum of \$17.32 per week, to recoup the overpayment resulting from the payment of auxiliary social security disability benefits not previously reported to the defendant.

The issue presented to the Court is whether the defendant was reasonable in its proposed schedule for the recoupment of the lump sum advances and social security overpayments.

The parties agree that claimant received an overpayment of social security disability benefits of \$12,878.44 and that repayment of such benefits is provided for in section 39-71-710, MCA (1985).

At trial defendant discovered for the first time that auxiliary social security benefits, had been received by the claimant in the amount of \$11,029.52. Claimant contends it should not be considered since it was not listed as a separate issue.

Defendant first became aware of the auxiliary overpayment at the time of trial because claimant and his counsel had failed to report the overpayment. Claimant cannot claim surprise or inability to prepare a response to the statutory recoupment.

The Court finds the undisputed auxiliary social security overpayment of \$11,029.52 is properly before the Court and part of the issue of claimant's overpayment from social security.

To recoup the auxiliary overpayment prior to the time claimant reaches 65 (637 weeks), assuming total disability, defendant is requesting a \$17.32 per week repayment.

This Court has approved the recoupment of lump sum advances as well as the statutory social security recoupment.

In ***Lecher v. Fireman's Fund***, WCC No. 8503-2956 (August 21, 1985) the Court stated as follows with respect to the issue of recoupment:

It is not sufficient for a claimant to simply request a lump sum with credit to the defendant from the distal end of the claimant's entitlement. There may be factual situations in the past and in the future where that is an appropriate Court ordered award. However, most claimants are already on an extremely tight budget and simply planning on having a greatly reduced income or no income at some point in the distant future is not debt management nor is it a plan. Generally, claimant should anticipate a biweekly repayment to the defendant over their estimated lifetime entitlement.

Lecher, supra at 11-12.

Also see ***Stanley Structures v. Aetna Life & Casualty Co. & Chester Scribner***, 253 Mont. 236, 833 P.2d 166 (1992).

Given the fact that the claimant had a history of hypertension and chest pains, is overweight and 52 years of age, forcing the defendant to wait until the "distal end" of the claimant's benefit entitlement places all the risk of recovery on the defendant, and no risk on the claimant. Should the claimant not survive until his 65th birthday, the only further entitlement would be his impairment award. Defendant could not have a repayment of the past advances. Given the claimant's health risks in this case, and the size of advances and overpayments already paid the claimant (\$38,579.39), the defendant's concerns are legitimate. Consequently, it is only fair to the defendant to permit it to continue with the recoupment program it initiated on June 23, 1992. Furthermore, given the introduction of the auxiliary benefit issue, the defendant should be entitled to recoup an additional \$17.32 per week until the auxiliary overpayment of \$11,029.52 is paid in full.

3. Defendant acted reasonable in the payment of claimant's benefits and claimant is not entitled to a penalty pursuant to section 39-71-2907, MCA.

PROPOSED JUDGMENT

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

2. Defendant is entitled to continue to recoup the sum of \$39.95 from claimant's current bi-weekly benefits. Defendant is further entitled to reduce the claimant's bi-weekly benefits by the additional sum of \$17.32 per week, to recoup the overpayment resulting from the payment of auxiliary social security disability benefits not previously reported to the defendant.

3. Defendant acted reasonable in the payment of claimant's benefits and claimant is not entitled to a penalty pursuant to Section 39-71-2907, MCA.

4. Claimant is not entitled to attorney fees and costs.

5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Proposed Judgment.

DATED in Helena, Montana, this 26th day of October, 1993.

(SEAL)

\s\ ROBERT J. CAMPBELL

Hearing Examiner

c: Mr. Darrell S. Worm

Mr. Thomas R. Bostock

Submitted: July 22, 1993