IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 24

WCC No. 2003-0826

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Petitioner

vs.

LINDA WARNER, guardian for CHRISTOPHER WARNER, an incapacitated person

Respondent.

DECISION AND JUDGMENT

Summary: Insurer petitioned the Court for a declaratory judgment concerning lump summing of impairment awards due permanently totally disabled claimants.

Held: Lump summing of impairment awards is not subject to the $20,000 limitation in section 39-71-741(1)(c), MCA (1997-2003), but is subject to the discounting requirement in section 39-71-741(2), MCA (1997-2003).

Topics:

Benefits: Impairment Awards. Impairment awards are subject to the same biweekly payment provision as other benefits. § 39-71-740, MCA (1961-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-740, MCA (1961-2003). Impairment awards are subject to the same biweekly payment provision as other benefits. § 39-71-740, MCA (1961-2003).

Benefits: Impairment Awards. Requests to lump-sum impairment awards are subject to section 39-71-741, MCA (1997-2003), but fall under permanent partial disability provisions for purposes of that statute whether or not payable to a permanently partially disabled or permanently totally disabled claimant.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-741, MCA (1997-2003). Requests to lump-sum impairment awards are subject to section 39-71-741, MCA (1997-2003), but fall under permanent partial disability provisions for purposes of that statute whether or not payable to a permanently partially disabled or permanently totally disabled claimant.

Benefits: Lump Sums: Impairment Awards. Requests to lump-sum impairment awards are subject to section 39-71-741, MCA (1997-2003), but fall under permanent partial disability provisions for purposes of that statute whether or not payable to a permanently partially disabled or permanently totally disabled claimant.

Benefits: Lump Sums: Impairment Awards. Lump summing of impairment awards is subject to the discounting requirement of section 39-71-741(2), MCA (1997-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-741, MCA (1997-2003). Lump summing of impairment awards is subject to the discounting requirement of section 39-71-741(2), MCA (1997-2003).

Benefits: Impairment Awards. Impairment awards payable to permanently totally disabled claimants are not subject to cost-of-living adjustments. § 39-71-702(5), MCA (1995-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-704(5), MCA (1995-2003). Impairment awards payable to permanently totally disabled claimants are not subject to cost-of-living adjustments. § 39-71-702(5), MCA (1995-2001).

Attorney Fees: Declaratory Judgment. Assuming the Declaratory Judgment Act applies to declaratory judgment actions in the Workers' Compensation Court, the claimant is not entitled to attorney fees where he has received all that he is entitled to and the insurer prevailed on the critical issues in dispute.

¶1 This case was brought by Liberty Mutual Fire Insurance Company (Liberty) to determine its liability for a lump sum payment of a 100% impairment award. The respondent is the guardian of Christopher Warner (claimant), who is permanently totally disabled as a result of an automobile accident in the course and scope of his employment.

¶2 The case is submitted for decision based upon a stipulation of facts. (Stipulation filed August 27, 2003.) The stipulated facts are set out below with some paraphrasing. Some of the facts are from the Court file.

FACTS

¶3 On April 15, 2002, the claimant was very seriously injured in a motor vehicle accident that occurred in the course and scope of his employment as a sales representative of Lee Enterprises, Incorporated.

¶4 Lee Enterprises was insured by Liberty at the time of the accident. Liberty accepted liability for the claimant's accident and injuries.

¶5 On April 3, 2003, the claimant's treating physician determined that the claimant had reached maximum medical improvement (MMI) and rated his impairment at 99% of the whole person. The parties have stipulated that the impairment rating should be rounded to 100% which entitles claimant to 350 weeks of benefits pursuant to section 39-71-703(3)-(5), MCA, and the Supreme Court's decision in *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

¶6 The impairment award is payable at $226 per week, thus the total impairment award due the claimant is $79,100 if paid out biweekly.

¶7 On June 11, 2003, Liberty paid claimant ten weeks of his impairment award, representing the amount of the award accumulated on a weekly basis since the April 3, 2003 MMI determination.

¶8 On June 12, 2003, Liberty initiated biweekly payments of the remaining 340 weeks of benefits. As of August 20, 2003, it had paid out an additional 10 weeks of benefits, leaving 330 weeks due.

¶9 On June 25, 2003, Liberty filed a Petition for Declaratory Judgment with this Court. The petition stated that the claimant had requested an immediate and full payout of the entire impairment award. Liberty requested a declaratory judgment as to (1) whether the claimant's impairment award is subject to the biweekly payment requirement of section 39-71-740, MCA (1961-2003); (2) whether any lump summing of the impairment award is subject to the $20,000 limitation set out in section 39-71-741(1)(c), MCA (1997-2003); and (3) whether any lump sum of the impairment award is subject to a present value discount under section 39-71-741(2), MCA (1997-2003).

¶10 Counsel for the claimant advised Liberty of pressing, immediate financial needs and requested a lump-sum payout of the remaining impairment award. The need was apparent and Liberty agreed that the claimants financial situation made a lump sum imperative. It agreed to a lump-sum payout of the claimant's remaining impairment award discounted to present value and subject to the Court's approval. A Stipulation incorporating the agreement was filed with the Court on August 27, 2003. The Stipulation provided that the issues raised in the petition would not be deemed moot, especially the present value discounting issue.

¶11 The Court approved the parties' Stipulation on September 2, 2003. Pursuant to the Stipulation, Liberty then paid the claimant the remaining 330 weeks of benefits discounted to present value. The payout was $64,897.53. Undiscounted, 330 weeks of benefits equal $74,910.00, a difference of $10,012.47.

¶12 Following approval of the Stipulation, the parties briefed the $20,000 limitation of section 39-71-741(1)(c), MCA (1997-2003), and the discounting issue. In addition to the

discounting and lump-sum issue, the claimant argues that provisions for cost-of-living increases offset any discount.

Discussion

¶13 Before addressing the specific legal issues presented for decision, it is appropriate that I address my approval of the parties' agreement to lump sum the claimant's remaining impairment award despite the $20,000 limitation set out in section 39-71-741(1)(c), MCA (1997-2003). My approval did not constitute a determination regarding the application of the section. Rather it reflected the claimant's urgent need for the payout, a need that both parties agree was compelling and immediate. The parties have in effect entered into a settlement agreement which provides for the payout but reserves the ultimate legal issues. Settlements in disputed cases are encouraged, and once a petition is filed, the Court has jurisdiction to approve settlements which may fashion remedies the Court might not be able to otherwise impose under existing law. While statutes and case law may limit the remedies a court may impose, they do not limit the parties in fashioning their own solution to their dispute. Indeed, the remedies the parties fashion among themselves may in fact be superior to the remedies a court is required to impose if the matter is litigated to finality.

¶14 With those introductory comments, I turn to the specific legal issues reserved for decision.

¶15 In *Rausch v. State Compensation Insurance Fund,* 2000 MTWCC 56, I held that impairment awards are permanent partial disability benefits and are not available to permanently totally disabled claimants. On appeal the Montana Supreme Court reversed my decision. It held that impairment awards are a distinct class of benefits which are not limited to permanently partially disabled claimants:

> Impairment awards are based on a worker's impairment rating, which is a purely medical determination of the loss of physical function of the body caused by the injury. § 39-71-711, MCA (1991 & 1997). The impairment rating is the physical component on which the disability is based. Disability benefits compensate the worker for losses related to their inability to work. An impairment award is paid to compensate the worker for the loss of physical function of his or her body, which may have ramifications beyond just the worker's ability to return to work. The difference is subtle, yet important. **The inclusion of continued impairment award liability in § 39-71-710, MCA (1991 & 1997), indicates the distinct nature of the impairment award from other types of disability benefits.**

Rausch, ¶ 21 (emphasis added). (All citations to *Rausch* hereinafter, including this one are in the Supreme Court decision found at 2002 MT 203.)

¶16 While the Supreme Court in *Rausch* held that impairment awards are a "distinct" type of benefit under the Montana Workers' Compensation Act, it held that where a claimant is

permanently totally disabled the impairment award must be classified as a permanent total disability benefit for purposes of the social security offset. It based that determination on the fact that the Social Security Act does not have a separate classification for impairment awards. Its discussion is illuminating:

> ¶38 Rausch contends that his impairment award should be characterized as part of his permanent total disability benefits, since impairment is simply the functional or medical component of that disability.
>
> ¶39 The State Fund did not address this issue in its brief on appeal. However, in the Workers' Compensation Court, the State Fund contended that an impairment award should be classified as neither a permanent total disability benefit nor a permanent partial disability benefit. The State Fund asserted that an impairment award is a unique benefit distinct from disability benefits and intended only to compensate claimants for the medical component of their disability. Therefore, it urged the Workers' Compensation Court to characterize impairment awards as a special class of benefits referred to as an "impairment award."
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> ¶40 The problem with the approach suggested by the State Fund is that the Social Security Administration does not recognize a class of [311 Mont. 223] benefits entitled "impairment award" or "impairment benefits." Periodically, the Social Security Administration requests workers' compensation insurers to complete a form for confirmation and classification of workers' compensation benefits being paid to individuals who concurrently receive workers' compensation benefits and social security disability benefits. Therefore, because *Rausch* will receive an impairment award, the State Fund will have to advise the Social Security Administration of how it classified those benefits by completing Form SSA-1709. Form SSA-1709, however, like Montana law, only recognizes the existence of four classifications of benefits, i.e., temporary partial, temporary total, permanent partial and permanent total. If we were to adopt the State Fund's suggestion, and a fifth classification of benefits was recognized under the guise of "impairment benefits," the Social Security Administration has stated that it would categorize the impairment award as a permanent partial benefit. Therefore, the Social Security Administration will offset Rausch's disability benefits, even though Rausch is permanently totally disabled, not permanently partially disabled.
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> ¶41 That result irrationally reduces Rausch's impairment award benefit, even though the State Fund concedes that impairment is merely the medical component of his total disability and that classification of impairment benefits for a permanently totally disabled worker as a partial disability benefit is improper. The most logical approach is to characterize the impairment award consistently with the

> claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in his disability.
>
> ¶42 Therefore, we conclude that because Kevin Rausch was permanently and totally disabled, his impairment award should be characterized as a permanent total disability benefit.

¶17 In this case, the parties do not dispute the claimant's entitlement to a one-hundred percent impairment award, only whether a lump sum of that award is limited by section 39-71-741(1)(c), MCA (1997-2003), to $20,000 and whether the lump sum must be discounted as provided in 39-71-741(2), MCA (1997-2003).

¶18 The claimant argues that he is entitled to a lump summing of his impairment award because impairment awards are not subject to the biweekly payment rule, thus section 39-71-741, MCA (1997-2003), need not even be considered. The argument is without merit. Section 39-71-740, MCA (1961-2003), provides: "**All** payments of compensation as provided in this chapter shall be made at the end of each 2-week period, except as otherwise provided herein." (Emphasis added.) It does not say "all payments *except impairment awards*." And there is no specific provision in the Workers' Compensation Act which "otherwise provides" for a different method of payment of impairment awards. The Court cannot rewrite the statute. § 1-2-101, MCA, ("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.").

¶19 The only section providing for a different method of payment than biweekly payments is section 39-71-741, MCA (1997-2003), which governs lump summing of benefits. Since the issues in this case involve multiple parts of the section, I set it out in full:

> **39-71-741. Compromise settlements and lump-sum payments**. (1) By written agreement filed with the department, benefits under this chapter may be converted in whole or in part into a lump sum. An agreement is subject to department approval. If the department fails to approve or disapprove the agreement in writing within 14 days of the filing with the department, the agreement is approved. The department shall directly notify a claimant of a department order approving or disapproving a claimant's compromise or lump-sum payment. Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department. The department may approve an agreement to convert the following benefits to a lump sum only under the following conditions:
>
> (a) all benefits if a claimant and an insurer dispute the initial compensability of an injury and there is a reasonable dispute over compensability;
>
> (b) permanent partial disability benefits if an insurer has accepted initial liability for an injury. The total of any permanent partial 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. The department may disapprove an agreement under this subsection (1)(b) only if the department determines that the lump-sum conversion amount is inadequate.

(c) permanent total disability benefits if the total of all lump-sum conversions in part that are awarded to a claimant do not exceed $20,000. The approval or award of a lump-sum permanent total disability payment in whole or in part by the department or court must be the exception. It may be given only if the worker has demonstrated financial need that:

(i) relates to:

(A) the necessities of life;

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

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

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

(d) except as otherwise provided in this chapter, all other compromise settlements and lump-sum payments agreed to by a claimant and insurer.

(2) Any lump-sum conversion of benefits under this section must be converted to present value using the rate prescribed under subsection (3)(b).

(3)(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.

(4) 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.

¶20 The degree of regulation set out in the section indicates it was intended by the legislature to be exclusive with respect to lump summing. "In determining legislative intent, an 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). The claimant's lump-sum request is therefore governed by the section.

¶21 As set forth in the section, there are three separate provisions for lump summing. One allows lump summing in disputed liability cases, § 39-71-741(1)(a), MCA (1997-2003), and has no application here since liability is conceded. A second allows lump summing of all undisputed permanent partial disability benefits, § 39-71-741(1)(b), MCA (1997-2003), and the third governs partial lump summing of permanent total disability benefits up to a total of $20,000. § 39-71-741(1)(c), MCA (1997-2003.) The question presented in this case is whether an impairment award due a permanently totally disabled claimant is a permanent partial disability benefit for purposes of the section or a permanent total disability benefit subject to the $20,000 limitation.[(1)]

¶22 While the *Rausch* decision provides support for characterizing impairment awards which are due permanently totally disabled workers as permanent total disability benefits, the discussion in *Rausch* indicates that its classification of those benefits as permanent total disability benefits was for purposes of the Social Security Act and not for other purposes. While noting that the benefits are distinct in nature from other benefits, the Court in *Rausch* was faced with classifying the benefits within the four classifications set out in the Social Security Act. The Court found that for purposes of the Act and social security offset provisions the benefit should most logically be characterized "consistently with the claimant's disability status." *Rausch*, ¶¶'s 40-41.

¶23 It is apparent from the Court's decision in *Rausch* that impairment awards have a unique, *sui generis* status under Montana law. *Rausch* at ¶ 21 *and see* previous discussion in this decision. But, like the Social Security Act, section 39-71-741, MCA (1997-2003) does not recognize impairment awards as separate benefits, distinguishing only between permanent and partial total disability benefits.

¶24 An argument could be made that by failing to specifically mention impairment awards in section 39-71-741, MCA, (1997-2003) the legislature intended to altogether exclude lump-summing of those benefits. That argument, however, ignores the fact that impairment awards are tied to permanent disability status, either expressly as in the case of impairment awards due under permanent partial disability benefits provisions found in section 39-71-703, MCA (1997-2001), or as a result of the interplay of several provisions applicable to permanently totally disabled claimants, as found in *Rausch*.

¶25 In rereading *Rausch*, I am persuaded that the Supreme Court would consider the permanent partial disability provision applicable to lump summing of impairment awards

irrespective of the disability status of the claimant. In paragraph 29 of *Rausch*, the Court said:

> ¶29 One final consideration is necessarily part of our statutory analysis. To provide an impairment award to permanently partially disabled claimants and not to permanently totally disabled claimants would lead to an absurd result, and contravene the intent underlying the Workers' Compensation Act. When more than one interpretation is possible, in order to promote justice, we will reject an interpretation that leads to an unreasonable result in favor of another that will lead to a reasonable result. *Johnson v. Marias River Elec. Co-op, Inc*. (1984), 211 Mont. 518, 524, 687 P.2d 668, 671. As interpreted by the Workers' Compensation Court, a permanently partially disabled worker, who is by definition less disabled, can receive an impairment award while a permanently totally disabled worker is deprived of the [311 Mont. 221] benefit. Therefore, the most disabled of all claimants, despite having an undisputed impairment rating caused as a result of a permanent loss of physical function, would receive no impairment award. Furthermore, an injured worker who is at first classified as a permanently partially disabled worker, but is subsequently reclassified as permanently totally disabled is eligible for a full impairment award, while another worker with the same injury who is from the onset classified as permanently totally disabled is ineligible. Such a result would be unreasonable and cannot have been the Legislature's intent.

While the quoted discussion was in the context of whether a permanently totally disabled claimant is entitled to an impairment award at all, the analysis applies equally to the question of lump summing. If the lump summing provision for permanent total disability benefits is applied, then anomalies similar to those outlined in the *Rausch* discussion will occur. Specifically, permanently partially disabled claimants could receive the full impairment award in a lump sum, whereas permanently totally disabled claimants could receive only $20,000. Moreover, a permanently totally disabled claimant who had been only permanently partially disabled for a short time could obtain the full award, whereas the claimant who has always been totally disabled would be, again, limited to $20,000.

¶26 My earlier holding that section 39-71-741, MCA, governs lump summing of impairment awards also answers the discounting question. Subsection (2) of section 39-71-741, MCA (1997-2003), expressly provides, "Any lump-sum conversion of benefits under this section must be converted to present value using the rate prescribed under subsection (3)(b)." It provides no exceptions and must be applied, as written, to all lump-sum conversions.

¶27 The claimant urges that if the discount provision applies then he is entitled to the cost-of-living adjustments (COLAs) provided in section 39-71-702(5), MCA (1995-2001), in computing his benefits. I disagree. The COLAs provided in subsection (5) are with respect

to the permanent total disability benefits authorized by the section. Impairment awards do not arise under the section and subsection (5) therefore has no application to them.

¶28 Finally, the claimant urges that he is entitled to attorney fees pursuant to the Declaratory Judgment Act and the cases of *Trustees of Indiana University v. Buxbaum,* 2003 MT 97, ¶ 46, 315 Mont. 210, ¶46, 69 P.3d 663, ¶46 *and Mountain West Farm Bureau v. Brewer,* 2003 MT 98, ¶36, 315 Mont. 231, ¶36, 69 P.3rd 652 ¶36.

¶29 Assuming the Declaratory Judgment Act applies to actions in the Workers' Compensation Court, it does not expressly authorize an award of attorney fees. *Buxbaum* at ¶ 46. However, in *Buxbaum* the Supreme Court determined that a court in a declaratory judgment action has "discretionary authority" to award attorney fees where such award is "necessary or proper." The authority arises under section 27-8-313, MCA, which provides: "Further relief based on a declaratory judgment or decree may be granted whenever necessary and proper." Again assuming declaratory judgment provisions apply in the Workers' Compensation Court, I find an award of attorney fees neither necessary or proper in this case. The insurer's position has been substantially sustained and the claimant has already received everything to which he is entitled.

¶30 I have read *Mountain West* and I am unable to understand how that precedent even remotely applies to this action. That case dealt with the authority to award attorney fees where an insurer breaches its duty to defend or indemnify its insured. It applies to liability insurance situations, not to workers' compensation.

JUDGMENT

¶31 An impairment award due a permanently totally disabled claimant may be converted in whole or part to a lump sum, however, such conversion is subject to the discounting requirement under section 39-71-741(2), MCA (1997-2003).

¶32 Impairment awards to permanently totally disabled claimants are not subject to the cost of living adjustments specified in section 39-71-702(5), MCA (1995-2001).

¶33 The impairment award payable to the claimant has been paid in full.

¶34 The claimant is not entitled to attorney fees.

¶35 This Decision and Judgment is certified as final for purposes of appeal.

DATED in Helena, Montana this 9th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Carrie L. Garber
Mr. Monte D. Beck
Submitted: October 3, 2003

1. I do not consider whether the $20,000 limitation applies in cases where a full conversion of all total disability benefits is sought. *See Martin v. The Hartford,* 2003 MTWCC 25, ¶¶'s 32-35. Here, the only conversion sought was with respect to the impairment award.