IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 70

WCC No. 9606-7564

JAMES MAJOR

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA MAJOR WINDOW

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Self-employed window salesman/installer elected sole proprietor coverage in workers' compensation insurance policy. He declared monthly wages of $900 for purposes of the election. After suffering an injury, claimant alleged he was limited in job duties and wanted wage supplement benefits based on loss of post-injury business earnings rather than declared $900 monthly earnings.

Held: Section 39-71-118(2)), MCA (1989), provides that "all weekly compensation benefits must be based on elected wages...." Section 39-71-703(1)(b)(i), MCA (1989), which governs wage supplement benefits, states that a worker must be "compensated in weekly benefits." Under the plain language of the statutes, all weekly benefits, including wage supplement benefits, must be based on the amount elected. Thus, $900 is claimant's time-of-injury wage for purposes of wage supplement benefits.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-118(2), MCA (1989). Where sole proprietor who elected coverage declared monthly earnings at $900 for policy purposes, insurer properly refused to base wage supplement benefits on loss of post-injury earnings rather than declared wages. Section 39-71-118(2)), MCA (1989), provides that "all weekly compensation benefits must be based on elected wages...." Section 39-71-703(1)(b)(i), MCA (1989), which governs wage supplement benefits, states that a worker must be "compensated in weekly benefits." Under the plain

language of the statutes, all weekly benefits, including wage supplement benefits, must be based on the amount elected.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703(1)(b)(i), MCA (1989). Where sole proprietor who elected coverage declared monthly earnings at $900 for policy purposes, insurer properly refused to base wage supplement benefits on loss of post-injury earnings rather than declared wages. Section 39-71-118(2)), MCA (1989), provides that "all weekly compensation benefits must be based on elected wages...." Section 39-71-703(1)(b)(i), MCA (1989), which governs wage supplement benefits, states that a worker must be "compensated in weekly benefits." Under the plain language of the statutes, all weekly benefits, including wage supplement benefits, must be based on the amount elected.

Benefits: Permanent Partial Benefits: Generally. Where sole proprietor who elected coverage declared monthly earnings at $900 for policy purposes, insurer properly refused to base wage supplement benefits on loss of post-injury earnings rather than declared wages. Section 39-71-118(2)), MCA (1989), provides that "all weekly compensation benefits must be based on elected wages...." Section 39-71-703(1)(b)(i), MCA (1989), which governs wage supplement benefits, states that a worker must be "compensated in weekly benefits." Under the plain language of the statutes, all weekly benefits, including wage supplement benefits, must be based on the amount elected.

The issue presently before the Court involves a matter of statutory interpretation. Specifically, the parties ask the Court to determine whether the amount of coverage a sole proprietor elects pursuant to section 39-71-118(2), MCA (1989), as the basis for weekly compensation benefits, is the sole proprietor's "actual wages" for the purpose of determining wage supplement benefits under section 39-71-703(b)(i), MCA (1989).

Stipulated Facts

The parties have stipulated to the following facts:

1. On August 16, 1989, the Petitioner was self-employed as a window salesman/installer. On September 15, 1989, the Petitioner had purchased workers' compensation insurance from the State Fund and elected coverage for himself. The Petitioner's declared monthly wages were $900.00. (Exhibit No. 1, Coverage Declaration Sheet and Exhibit No. 2, Owner or Partner Endorsement.)

2. On October 16, 1989, the Petitioner suffered an injury while in the course and scope of his employment. He was paid temporary total disability benefits at the rate of $138.08 per week from October 24, 1989, through June 14, 1991, when his injuries reached maximum medical healing and he returned to work. (Exhibit No. 3, Claim for Compensation.)

3. On February 25, 1994, the Petitioner was given a 9% impairment rating and paid 45 weeks of permanent partial disability benefits at the rate of $138.08 per week. (Exhibit No. 4, February 25,1994 correspondence from Dr. Laidlaw.)

4. Petitioner returned to his self-employment venture in June of 1991. Due to his injury he is now limited in the job duties he can perform. He is no longer able to work as an installer. Petitioner alleges that as a result his business income has decreased substantially.

(Agreed Statement of Facts and Issue at 1-2.)

Issue

The parties frame the issue presented at present as follows:

The parties further agree to presenting the following issue to the Court for summary ruling:

For purposes of calculating Petitioner's wage supplement benefits pursuant to section 39-71-703, MCA (1989) are post injury business earnings compared to actual wages earned in Petitioner's business at the time-of-injury or $900.00 a month, his elected coverage?

(*Id*. at 2.)

Statutes Involved

The issue presented to the Court involves sections 39-71-118(2) and -703(1)(b)(i), MCA (1989). The claimant was injured on October 16, 1989, so the 1989 versions of those sections apply to the injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). The sections provide in relevant part:

(2)(a) If the employer is a partnership or sole proprietorship, such employer may elect to include as an employee within the provisions of this chapter any member of such partnership or the owner of the sole proprietorship devoting full time to the partnership or proprietorship business.

(b) In the event of such election, the employer must serve upon the employer's insurer written notice naming the partners or sole proprietor to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (2)(d). A partner or sole proprietor is not considered an employee within this chapter until such notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection. For premium ratemaking and for the determination of weekly wage for weekly compensation benefits,

the electing employer may elect not less than $900 a month and not more than 1½ times the average weekly wage as defined in this chapter. [Emphasis added.]

§ 39-71-118(2), MCA (1989).

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury. [Emphasis added.]

§ 39-71-703(1)(b)(i), MCA (1989).

Discussion

Relying on the "actual wages" language of section 39-71-703(1)(b)(i), MCA (1989), the petitioner argues that he is not bound by his $900 election and is entitled to use his actual earnings in computing wage supplement benefits. Presumably, those earnings are higher than the $900 he elected when obtaining workers' compensation insurance coverage.

Where the language of a statute is plain on its face, the Court must apply the statute as written. *See Department of Revenue v. Dray,* 266 Mont. 89, 92, 879 P.2d 651, 652 (1994). However, sections within an act cannot be read in isolation. They must be coordinated and harmonized with other sections. *State v. Meador,* 184 Mont. 32, 36-37, 601 P.2d 386, 388-89 (1979).

In the present case, section 39-71-118(2)(d), MCA (1989), specifically provides in relevant part, "**All weekly compensation benefits** must be based on the amount of **elected wages** . . . ." (Emphasis added.) Wage supplement benefits are "weekly compensation benefits." Section 39-71-703(1)(b)(i), MCA (1989), which governs the payment of wage supplement benefits, states in relevant part, "A worker must be compensated **in weekly benefits** . . . ." (Emphasis added.) The terms of the statute could not be plainer: **All** weekly benefits, including wage supplement benefits, payable to a sole proprietor electing coverage under the Workers' Compensation Act, must be based on the amount elected by the proprietor under section 39-71-118(2), MCA (1989).

The two sections are harmonized by reading section 39-71-118(2)(d), MCA (1989), as defining "actual wages" for sole proprietors. This reading is consistent with the rule of statutory construction requiring courts to give effect, where possible, to all provisions and language in a statute. *Dale v. Trade Street, Inc.,* 258 Mont. 349, 357, 854 P.2d 828, 832 (1993). Petitioner's reading of the statute would create an exception to the comprehensive -- "all weekly compensation benefits" -- language of the section, thus nullifying that language. Such interpretation is contrary to the rule that courts should "give effect to all of the words used," *State V. Berger,* 259 Mont. 364, 367, 856 P.2d 552, 554 (1993), and the rule

that courts cannot "omit what the legislature has included," *In re R.R.K,* 260 Mont. 191, 197, 859 P.2d 998, 1002 (1993) (citing § 1-2-101, MCA). Moreover, even if the language in the two sections is deemed in conflict, that conflict must be resolved in favor of the more specific provision. *Mosely v. Lake County Justice Court*, 256 Mont. 206, 208, 845 P.2d 732, 733-34 (1993). Here, the more specific provision is section 39-71-118(2)(d), MCA, which specifically pertains to sole proprietors and partners, while section 39-71-703(1)(b), MCA, pertains to injured workers in general.

I therefore hold that $900 is petitioner's time-of-injury wage for purposes of computing his wage supplement benefits.

Partial summary judgment is entered for respondent in accordance with the foregoing holding. A trial to determine the proper rate for wage supplement benefits and whether petitioner is entitled to a lump sum shall be scheduled during the week of March 17, 1997, in Kalispell, Montana. A scheduling order will be issued under separate cover.

DATED in Helena, Montana, this 15th day of November, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Thomas E. Martello
Submitted: October 30, 1996