

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 61

WCC No. 9705-7749

RONALD MOGUS

Petitioner

vs.

RELIANCE NATIONAL INDEMNITY

INSURANCE COMPANY

Respondent/Insurer for

RHONE-POULENC

Employer.

ORDER AND JUDGMENT

Summary: Claimant received permanent total disability benefits until he reached age 65, retirement age. Based on a 21% whole person impairment rating, the insurer paid claimant an impairment award, but refused to pay him other permanent partial disability benefits. Claimant alleged he was entitled to additional PPD benefits because he was no longer entitled to temporary or permanent total disability benefits. The matter was presented on stipulated facts.

Held: To be entitled to permanent partial disability benefits, claimant must meet the definition under section 39-71-116(15), MCA (1991), which includes the requirement that he be able to return to work in some capacity. Because he was permanently totally disabled, which means he was not able to return to work in any capacity (see section 39-71-116(16), MCA (1991)), he cannot qualify for permanent partial disability benefits.

Topics:

Benefits: Permanent Partial Benefits: Retirement. Claimant received permanent total disability benefits until he reached age 65, retirement age. The insurer paid claimant an impairment award, but refused to pay him other permanent partial disability benefits. To be entitled to permanent partial disability benefits, claimant must meet the definition under section 39-71-116(15), MCA (1991), which includes the requirement that he be able to return to work in some capacity. Because he was

permanently totally disabled, which means he was not able to return to work in any capacity (see section 39-71-116(16), MCA (1991)), he cannot qualify for permanent partial disability benefits.

The issue presented in this case is whether a permanently totally disabled worker injured on April 10, 1992, is entitled to permanent partial disability benefits upon reaching age 65. The matter is presented to the Court upon Petitioner's Motion for Summary Judgment (July 8, 1997).

Facts

Petitioner and claimant, Ronald Mogus (Mogus), filed a Petition for Hearing on May 12, 1997. In his petition he alleged the following facts:

On April 10, 1992, he injured his right arm while working for Rohne-Poulenc.

He was thereby rendered permanently totally disabled and was paid permanent total disability benefits until January 7, 1997, on which date he reached his 65th birthday.

As a result of his injury, he received a 21% whole person impairment rating and the insurer paid the full impairment award based on the rating.

In its response, Reliance National Indemnity Insurance Company (Reliance), admits the foregoing allegations.

Discussion

Mogus alleges that upon reaching age 65 he became entitled to additional permanent partial disability benefits amounting to an additional 45% of the maximum permanent partial disability benefit available. Reliance contends that since Mogus is permanently totally disabled he does not satisfy the criteria for permanent partial disability benefits.

In seeking permanent partial disability benefits, Mogus relies on *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 874 P.2d 1217 (1994). *Russette*, however, is inapposite. In that case the claimant was not permanently **totally** disabled. Rather, both parties agreed claimant was permanently partially disabled and the only issue was whether he was entitled to a continuation of permanent partial disability benefits upon reaching age 65 and qualifying for social security benefits. The issue in this case is whether a permanently totally disabled claimant is entitled to permanent partial disability at all.

The issue is one of law. The essential facts as set out in the petition and are admitted in the response. Thus, the motion for summary judgment is in effect one for judgment on the pleadings. See Rule 12(c), Mont. R. Civ. P.

Under the 1991 Workers' Compensation Act, which is the Act applicable in this case, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986),

permanent partial disability benefits are governed by section 39-71-703, MCA (1991), which provides in relevant part:

(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.]

On its face, the statute provides that to qualify for permanent partial disability benefits the injured worker must be both permanently partially disabled **and** be "no longer entitled to temporary total or permanent total disability benefits." The statute is in the conjunctive, which means that all conditions enumerated in the section must be met.

To be entitled to permanent partial disability benefits, Mogus must meet the definition of permanent partial disability. *Williams v. Plum Creek Timber Co.*, 270 Mont. 209, 214, 891 P.2d 502, 504 (1995). Permanent partial disability is defined by section 39-71-116(15), MCA (1991). The section provides:

(15) "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) **is able to return to work in some capacity** but the physical restriction impairs the worker's ability to work. [Emphasis added.]

The parties agree that claimant is permanently totally disabled. Permanent total disability is defined by 39-71-116(16), MCA (1991) as:

(16) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

The definitions of permanent total and permanent partial disability are mutually exclusive. Permanent total disability requires that the worker have no reasonable prospect of physically performing regular work, whereas permanent partial disability provides that the worker be "able to return to work in some capacity." Since Mogus is permanently totally disabled, he cannot meet the definition of permanently partially disabled and is not entitled further benefits.

JUDGMENT

1. Judgment for respondent, Reliance National Indemnity Insurance Company. The petition is **dismissed with prejudice**.

2. This judgment is certified as final for purposes of appeal.

3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 24th day of October, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Bernard J. Everett

Mr. Brendon J. Rohan

Submitted: July 21, 1997