IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 44

WCC No. 2004-0999

DOUG OTTESON

Petitioner

vs.

MONTANA STATE FUND

Respondent.

SUMMARY JUDGMENT

AFFIRMED 08/16/05

Summary: The claimant, who is permanently totally disabled, seeks a declaratory judgment finding that he is entitled to permanent *partial* disability benefits upon becoming eligible for social security disability benefits, at which time his permanent total disability benefits will terminate.

Held: The claimant is not entitled to permanent partial disability benefits since he is not and has not been permanently partially disabled. His reliance on *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986) and *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 874 P.2d 1217 (1994), is misplaced.

Topics:

Benefits: Permanent Partial Benefits: Retirement. Under 1993 law, a permanently totally disabled claimant who has never been only partially disabled is not entitled to permanent partial disability benefits upon reaching social security retirement age. § 39-71-703, MCA (1993). *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986) and *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 874 P.2d 1217 (1994), are distinguishable and inapposite.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703 (1991-1993). Under 1993 law, a permanently totally disabled claimant who has never been only partially disabled is not entitled to permanent partial disability benefits upon reaching social security retirement age. § 39-71-703, MCA (1993). *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139

(1986) and *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 874 P.2d 1217 (1994), are distinguishable and inapposite.

Cases Discussed: *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986). *Hunter,* which held that a claimant is entitled to permanent partial disability benefits despite having reached social security retirement age, is inapposite under 1993 law. It was based on provisions which have been repealed or repudiated by the legislature.

Cases Discussed: *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 874 P.2d 1217 (1994). *Russette*, which held that under 1993 law, specifically section 39-71-703, MCA (1991-1993), a permanently partially disabled claimant is entitled to a continuation of permanent partial disability benefits, is not controlling with respect to the entitlement of a permanently *totally* disabled claimant to permanent partial disability benefits.

Statutes and Statutory Interpretation: Plain Meaning. The primal rule of statutory interpretation requires courts to apply plain and unambiguous statutes according to their plain terms; a court cannot amend, omit, or insert terms of the statute.

Statutes and Statutory Interpretation: Absurd Results. The rule regarding absurd results applies only if a statute is ambiguous. If the statute is plain and clear on its face, it must be applied as written even if a court considers the result absurd.

¶1 The parties in this case submit their dispute on petitioner's (claimant's) motion for summary judgment. The facts are not in dispute and the matter involves statutory interpretation and the application of case law.

Facts

¶2 The claimant was injured in an industrial accident on January 24, 1994. At the time of his accident, the Montana State Fund (State Fund), insured his employer. It accepted liability for his claim, agreed that he is permanently totally disabled, and has paid him permanent total disability benefits.

¶3 The State Fund has also paid claimant a thirty percent impairment award. The claimant has never been declared or classified as permanent *partially* disabled.

¶4 The claimant turned age sixty-five on May 3, 2004. He asserts in his opening brief that his permanent total disability benefits should cease on that date since he will be entitled to social security retirement benefits at that time. State Fund disagrees with the retirement date, asserting that the claimant is not eligible for social security retirement until September 3, 2004, and that his permanent total disability will not cease until then. Since that assertion favors the claimant, and the claimant does not dispute the assertion, I

accept the September 3, 2004 date as the date when the claimant's permanent total disability benefits cease.

Decision

¶5 Since the claimant's injury occurred in 1994, the 1993 version of the Workers' Compensation Act applies since that was the law in effect at the time of the injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). This point is important because of the biennial changes to Montana's Workers' Compensation Laws. Those changes often overrule or render inapplicable court decisions made under prior versions of the law. A case in point is *Russette v. State Compensation Ins. Fund,* 265 Mont. 90, 874 P.2d 1217 (1994), wherein the Supreme Court held that a permanently partially disabled claimant was entitled to permanent partial disability (PPD) benefits even though he was deemed retired under section 39-71-710, MCA (1993). A year after that decision the legislature amended section 39-71-710, MCA, to expressly bar PPD benefits for claimants deemed retired under the section. 1995 Mont. Laws, ch. 516, § 13.

¶6 Section 39-71-710, MCA (1993), is again in play in this case. The claimant contends that under *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986) and *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 874 P.2d 1217 (1994), he is entitled to PPD benefits upon becoming eligible for social security retirement benefits.

¶7 I addressed and rejected this very contention in *Mogus v. Reliance National Indemnity Insurance Company,* 1997 MTWCC 61. Applying other sections of the 1993 laws governing payment of PPD benefits, I held that the claimant was ineligible for those benefits because he was not permanently *partially* disabled, rather he was permanently *totally* disabled. Notwithstanding the claimant's invocation of *Hunter* and *Russette*, I reaffirm my decision in *Mogus*. *Hunter* is inapposite in light of significant changes in the workers' compensation laws since it was decided. *Russette* is inapposite because it involved a permanent *partially* disabled claimant.

¶8 In 1993, section 39-71-710, MCA, provided:

> **39-71-710. Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent total disability, and rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

> (2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

In its decision in *Russette,* the Supreme Court held that a claimant receiving PPD benefits at the time he began receiving social security retirement benefits was entitled to a continuation of those benefits since subsection (1) does not expressly exclude permanent partial disability benefits. It refused to equate PPD benefits with "wage supplement" benefits.[(1)] This case, however, does not involve benefits due a permanently partially disabled claimant. *Russette* therefore supports his argument only if he is *otherwise entitled* to permanent partial disability benefits. I analyze that entitlement later on.

¶9 The claimant's reliance on *Hunter* is similarly misplaced. *Hunter* involved the 1983 version of section 39-71-710, MCA. In *Hunter* the claimant had taken early social security retirement at age sixty-two but had returned to work. She was injured on May 29, 1984; she turned age sixty-five on September 23, 1986. At the time of her injury, section 39-71-710, MCA (1981-1985), provided:

> If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. This section does not apply to permanent partial disability benefits. Medical benefits are expressly reserved to the claimant.

Construing section 39-71-710, MCA, in favor of the claimant, the Court held that she was entitled to PPD benefits even though she was totally disabled. Its rationale was as follows:

> [L]iberal construction of the statute, as mandated by § 39-71-104, MCA, results in the conclusion claimant is entitled to an award of permanent partial benefits upon reaching the age of 65.
>
> Section 39-71-710, MCA, explicitly provides: "This section does not apply to permanent partial disability benefits." In the present case, the claimant, who had been receiving temporary total disability benefits, petitioned the Workers' Compensation Court for an award of permanent partial benefits commencing on her 65th birthday.
>
> As noted by the Workers' Compensation Court in *Johnson*, supra, strict construction of § 39-71-710, MCA, would result in an absurdity: A worker injured past the age of 65 may recover compensation if partially disabled but not if totally disabled. We agree with the court's interpretation of § 39-71-710, MCA, allowing for payment of

permanent partial disability benefits to a permanently totally disabled claimant who has reached the age of 65.

Hunter at 484-85.

¶10 As can be seen from the quoted portion of *Hunter,* the decision was pinioned on two factors. The first was the "liberal construction" rule. That rule was expressly repudiated by the 1987 legislature, which enacted section 39-71-105(4), MCA (1987-2003), providing, "Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party." The second was the language of stating "This section does not apply to permanent partial disability benefits." § 39-71-710, MCA (1981-1985). That language was no longer a part of the section when the claimant in this case was injured.

¶11 Moreover, the entire statutory scheme regarding permanent partial disability benefits was changed after the decision in *Hunter.* In 1993 PPD benefits were governed by two sections. The first was section 39-71-703, MCA (1991-1993), which provides in relevant part:

> **39-71-703. Compensation for permanent partial disability.** (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.

The primal rule of statutory interpretation requires courts to apply plain and unambiguous statutes according to their express terms; a court cannot amend, omit or insert terms of 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.");*State ex rel. Cobbs v. Montana Dept. of Social and Rehabilitation Services,* 274 Mont. 157, 162, 906 P.2d 204, 207 (1995) ("The Court is to effectuate the intent of the Legislature, and if the Legislature's intent can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply any other means of interpretation."); *Ravalli County v. Erickson,* 2004 MT 35, ¶11, 85 P.3d 772 ("This Court has repeatedly held that the role of courts in applying a statute has always been 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 . . . .") Section 39-71-703(1), MCA, is plain on its face and unambiguous. Its requirements are in the conjunctive, thus, two conditions must be met for a worker to receive PPD benefits. First, the worker must be suffering from permanent partial disability. Second, he must no longer be entitled to temporary or permanent total disability benefits.

¶12 It is the first requirement that is determinative in this case. Permanent partial disability is expressly defined, and that definition is similarly plain, unambiguous, and unequivocal. Section 39-71-116(18), MCA (1993), provides:

(18) "Permanent partial disability" means a condition, after a worker has reached maximum medical 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.]

Neither party in this case contends that the claimant was ever able to return to work; both agree that he has been permanently totally disabled since his industrial accident. Thus, under the plain terms of the definition, the claimant is not permanently partially disabled and is not entitled to permanent partial disability benefits under section 39-71-703, MCA (1993).

¶13 I need not consider the claimant's argument concerning avoidance of absurd results when interpreting statutes. That rule applies only to ambiguous statutes. Absurdities undoubtedly abound among the thousands of statutes enacted by Montana's legislature, but unless a statute is ambiguous a court's role is to simply to apply it as written.

¶14 Finally, I address the claimant's demand for attorney fees and a penalty. Even if my decision is reversed on appeal, the State Fund has acted reasonably and in reliance on my prior decision in *Mogus,* a decision that was not appealed and has remained unchallenged for more than six years.

JUDGMENT

¶15 The claimant is not entitled to permanent partial disability benefits upon becoming eligible for social security retirement benefits, at least so long as he is totally disabled and not permanently partially disabled. His petition is **dismissed with prejudice**.

¶16 This Judgment is certified as final for all purposes of appeal.

¶17 Any party to this dispute may have twenty days in which to request a rehearing from this Summary Judgment.

DATED in Helena, Montana, this 27th day of May, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. Greg E. Overturf
Submitted: May 17, 2004

1. It did so even though the wage supplement benefits under pre-1991 law were expressly categorized as permanent partial disability benefits. Section 39-71-703, MCA (1987-1991), was captioned "Compensation for permanent partial disability - impairment awards and wage supplements, "and provided in subsection (1), "The benefits available for permanent partial disability are impairment awards and wage supplements."