IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 61

WCC No. 9801-7909

WILLIAM R. PITTSLEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

3-MOR ENTERPRISES

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Permanently totally disabled sawyer claimed rental payments for timber falling equipment he received from employer should be included in his wages for purposes of determining benefit rate. State Fund relied on ARM 24.29.720 as authority for deducting up to $22.50 per working day in rental fees from wages.

Held: Where ARM 24.29.720 by its own terms was effective January 1, 1993, which was after the sawyer's injury and the four relevant pay periods preceding his injury, the rule provided no authority for the deduction made by State Fund. Because the statute authorizing the DOL to adopt the rule, section 39-71-123(2)(a), MCA (1991), was neither self-executing as to specific exclusions, nor properly retroactively applied to claimant's situation, there is no basis for the deduction made by the insurer.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Administrative Regulations: ARM 24.29.720.** Administrative rule adopted by DOL to specify employee expenses which are not wages was by its own terms effective only commencing January 1, 1993. Where sawyer's injury, and the relevant four pay periods preceding injury, occurred before the rule's effective date, the rule's specification that rental value of

timber falling equipment not exceeding $22.50 per day could be excluded from wage rate was not applicable to computation of his wage rate.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-123, MCA (1987). ARM 24.29.720, an administrative rule adopted by DOL to specify employee expenses which are not wages, was by its own terms effective only commencing January 1, 1993. Where sawyer's injury, and the relevant four pay periods preceding injury, occurred before the rule's effective date, the rule's specification that rental value of timber falling equipment not exceeding $22.50 per day could be excluded from wage rate was not applicable to computation of his wage rate.

Statutes and Statutory Interpretation: Retroactive (defined). A retroactive law is one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed. Statutes effecting substantive rights and obligations must be applied prospectively unless the legislation expressly provides otherwise. See §1-2-109, MCA. A statute need not specifically state that it is retroactive to avoid the rule. If it is unmistakable that an act was intended to operate retrospectively, that intention is controlling as to the interpretation of the statute. Language showing unmistakable legislative intention of retroactivity must, however, appear on the face of the statute.

Statutes and Statutory Interpretation: Retroactivity. ARM 24.29.720, an administrative rule adopted by DOL to specify employee expenses which are not wages, was by its own terms effective only commencing January 1, 1993. Where sawyer's injury, and the relevant four pay periods preceding injury, occurred before the rule's effective date, the rule's specification that rental value of timber falling equipment not exceeding $22.50 per day could be excluded from wage rate was not applicable to computation of his wage rate. Even if the rule were not express in its date of application, regulations, like statutes, are subject to the general rule against retroactive application.

Wages: Saw Rental. ARM 24.29.720, an administrative rule adopted by DOL to specify employee expenses which are not wages, was by its own terms effective only commencing January 1, 1993. Where sawyer's injury, and the relevant four pay periods preceding injury, occurred before the rule's effective date, the rule's specification that rental value of timber falling equipment not exceeding $22.50 per day could be excluded from wage rate was not applicable to computation of his wage rate.

¶1 This Court previously denied petitioner's motion for partial summary judgment on account of his failure to comply with rules governing summary judgment. Specifically, petitioner failed to set forth uncontroverted facts in serial fashion and failed to provide evidentiary support for his factual allegations. Order Denying Motion for Partial Summary Judgment (June 4, 1998).

¶2 Thereafter, the parties provided the Court with a Stipulated Statement of Uncontroverted Facts (June 22, 1998), and requested the Court to revisit the motion. Based on the stipulated facts, I find reconsideration appropriate.

Uncontroverted Facts

1. The Petitioner is permanently and totally disabled.

2. At the time of the accident, the statutory maximum total disability rate was $336 per week.

3. The State Fund is entitled to a Social Security offset of $98.39 per week.

4. Gross earnings for the 4 semi-monthly pay periods preceding his date of accident are as follows:

10/25/91	$1235.30
11/12/91	1301.90
11/27/91	1341.60
12/12/91	686.50

5. The gross earnings were proportioned as 75% for wages and 25% for saw rental.

6. If the Petitioner is given full credit for saw rental, he would be entitled to the maximum of $336 per week, less the Social Security offset.

7. The Petitioner claimed saw rental as income on his 1991 taxes, less certain deductions.

8. The Respondent computed Mr. Pittsley's average weekly wage by using ARM 24.29.720 which set the maximum excludable around the saw rental at $22.50 per work day for chain saw and related timber falling expenses. The State Fund therefore deducted $112.50 per week from the average weekly wage which yielded a corresponding TTD rate of $275.23 before Social Security offset.

9. ARM 24.29.720 was not in existence at the time of injury.

10. The only issue which remains in the case at this juncture is one of legal interpretation as to the applicable law for saw rental at the time of injury in December of 1991.

Issue

¶3 The issue presented by the motion for partial summary judgment is whether saw rental payments made to claimant should be included in determining his total disability rate. The petitioner's opening brief states that the parties have "stipulated" this is the only issue, however, in a reply brief he urges that a penalty and attorney fees are due. For purposes of the motion, the Court will consider only the saw rental dispute. It will take up other matters at trial set during the next term of Court.

Discussion

I.

¶4 In a 1989 decision, this Court determined that saw rental paid a sawyer must be included in determining the wages of the sawyer for purposes of workers' compensation benefits. *Bobby Guckenberg v. State Compensation Ins. Fund*, WCC No. 8808-4883, Findings of Fact and Conclusions of Law and Judgement (June 20, 1989). The case was decided under the 1987 version of the Workers' Compensation Act (WCA). The State Fund does urge that it should be overruled.

¶5 The 1987 statute governing wages, § 39-71-123(1), MCA (1987), provided that wages means "gross remuneration paid in money, or in a substitute for money, for services rendered by an employee." The subsection went on to list commissions and bonuses as remuneration constituting wages, as well as holiday, vacation, and sick pay and board, lodging, rent and housing if in payment for work. Subsection (2) excluded travel expense reimbursement, undocumented tips, and certain fringe benefits from the definition of wages, providing:

> **39-71-123 Wages defined.**
>
> . . . .
>
> (2) Wages do not include:
>
> (a) employee travel expense reimbursements or allowances for meals, lodging, travel, and subsistence;
>
> (b) special rewards for individual invention or discovery;
>
> (c) tips and other gratuities received by the employee in excess of those documented to the employer for tax purposes;

(d) contributions made by the employer to a group insurance or pension plan; or

(e) vacation or sick leave benefits accrued but not paid.

In 1991 the legislature amended subsection (2)(a) to read as follows:

(2) "Wages" do not include:

(a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, **and other expenses, as set forth in department rules**. [Emphasis added.]

¶6 The Department of Labor and Industry thereafter promulgated new rules governing employee expenses. The rules, found at ARM 24.29.720, were adopted effective December 25, 1992.[(1)] They provide:

24.29.720 PAYMENTS THAT ARE NOT WAGES --- EMPLOYEE EXPENSES (1) Effective January 1, 1993, payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred in the course and scope of employment are not wages if all of the following are met:

(a) the amount of each employee's reimbursement is entered separately in the employer's records;

(b) the employee could reasonably be expected to incur the expenses while traveling on the business of the employer;

(c) the reimbursement is not based on a percentage of the employee's wages nor is it deducted from wages; and

(d) the reimbursement does not replace the customary wage for the occupation.

(2) Reimbursement for expenses may be based on any of the following methods that apply:

(a) for actual expenses incurred by the employee, to the extent that they are supported by receipts;

(b) for meals and lodging, at a flat rate no greater than the amount allowed to employees of the state of Montana pursuant to 2-18-501(1)(b) and (2)(b), MCA for meals, and 2-18-501(5), MCA for lodging, unless, through documentation, the employer can substantiate a higher rate;

(c) for mileage, at a rate no greater than that allowed by the United States internal revenue service for the preceding year, provided that the individual actually furnishes the vehicle;

(d) for equipment other than vehicles, the reasonable rental value for that equipment, which for individuals involved in timber falling may not exceed $22.50 per working day for chain saw and related timber falling expenses;

(e) for heavy equipment, including but not limited to semi-tractors or bulldozers, the reasonable rental value may not exceed 75% of the employee's gross renumeration [sic];

(f) for drivers utilized or employed by a motor carrier with intrastate operating authority, meal and lodging expenses may be reimbursed by either of the methods provided in subsection (2)(a) or (b) for each calendar day the driver is on travel status; or

(g) for drivers utilized or employed by a motor carrier with interstate operating authority, meal and lodging expenses may be reimbursed by the methods provided in subsection (2)(a) or (b), or by a flat rate not to exceed $30.00 for each calendar day the driver is on travel status.

¶17 As set forth in subsection (2)(d) of the rule, the maximum amount of saw rental which may be excluded in calculating a sawyer's wages is $22.50 per day.

¶18 The effect of the exclusion is seen in the present case. Petitioner's gross earnings were allocated 75% for wages and 25% for saw rental.[(2)] If the full amount of the saw rental is included as part of his wages, then he is entitled to $336.00 per week in permanent total disability benefits, which is the statutory maximum. If subsection (2)(d) applies, then $22.50 per day of the saw rental payments are excluded in determining his weekly wage, reducing his total disability wage to $275.23 per week.

¶19 The State Compensation Insurance Fund (State Fund) has applied the rule and is paying claimant based on the lesser rate. Petitioner urges that the rule does not apply to his case and that the decision in *Guckenberg* must be followed. The Court agrees.

II.

¶20 Although overlooked by both parties, on its face the rule does not apply to this case. Subsection (1) by its own terms applies only to payments made on or after January 1, 1993. While the parties have focused on subsection (2)(d), which specifically concerns saw rental, that subsection cannot be read in isolation of subsection (1). Subsection (1) provides that reimbursement for an employee's "ordinary and necessary expenses" should

be excluded when computing wages if the expenses meet the criteria set forth in the subsection. Subsection (2) governs the amounts of specific exclusions, including saw rental; it applies only if subsection (1) does. Since claimant's wages were paid in October, November and December 1991 -- more than a year prior to the effective date of subsection (1), it is inapplicable to the present case. Thus, subsection (2) is also inapplicable.

III.

¶21 Even if subsection (2)(d) of ARM 24.29.720 is not subject to the January 1, 1993 effective date, the subsection is still inapplicable to wages paid prior to the adoption of the rule.

¶22 Statutes affecting substantive rights and obligations must be applied prospectively unless the legislature expressly provides otherwise. Section 1-2-109, MCA, provides:

> No law contained in any of the statutes of Montana is retroactive unless expressly so declared.

A statute need not specifically state that it is retroactive to avoid the rule. "If it is unmistakable that an act was intended to operate retrospectively, that intention is controlling as to the interpretation of the statute, even though it is not expressly so stated." *Neel v. First Federal Sav. and Loan Assoc. of Great Falls,* 207 Mont. 376, 386, 675 P.2d 96, 102 (1984) (citation omitted). Language showing unmistakable legislative intention of retroactivity must, however, appear on the face of the statute. *Id*.

¶23 In dictum, the Montana Supreme Court has recognized that the general rule against retroactive application of statutes applies to administrative rules as well. *Porter v. Galarneau,* 275 Mont. 174, 182, 911 P.2d 1143, 1148 (1996); *Haugen v. Blaine Bank of Montana,* 279 Mont. 1, 7, 926 P.2d 1364, 1367 (1996). This Court is unaware of any good reason to question the principal enunciated in the dictum.

¶24 A retroactive law is one which "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed." *Porter, 275* Mont. at 183, 911 P.2d at 1148-49. As to saw rentals, ARM 24.29.720 "takes away or impairs vested rights." The substantive effect of ARM 24.29.720 (2)(d) is obvious from a comparison of entitlement to benefits if the rule is inapplicable ($336.00 per week) with claimant's entitlement to benefits when the rule is applied ($275.23).

¶25 The Department did not expressly make ARM 24.29.720 retroactive, nor does any language in the regulation unequivocally and unmistakably show that the Department

intended the rule to operate retroactively. I therefore conclude that the rule is not retroactive and does not apply in this case.

IV.

¶26 Absent a retroactive application of ARM 24.29.720, there is no basis for excluding saw rental payments from the claimant's gross wages. This Court's decision in *Guckenberg* held that saw rental is to be included. The 1991 amendment to section 39-71-123, MCA, neither changed the general rule governing computation of gross wages nor specifically provided for exclusion of saw rental from gross wages. The only change it made was to authorize the Department of Labor and Industry to adopt rules for the exclusion of "other [employee] expenses" not specifically enumerated in the section. The amendment was not self-executing. Lacking a new rule, it effected no change concerning the inclusion of saw rental in gross wages.

PARTIAL JUDGMENT

¶27 1. In computing claimant's wages for purposes of workers' compensation benefits, the State Fund must include the amount of saw rental payments to claimant.

¶28 2. Claimant's total disability rate is $336 per week.

¶29 3. The State Fund shall pay to claimant in a lump sum the difference between the benefits due him pursuant to this Decision and the benefits actually paid him. The Court retains continuing jurisdiction to determine the actual amount due should the parties be unable to agree on the amount.

¶30 4. The matter of attorney fees and a penalty has not been submitted for decision at this time. Those matters will be set for trial during the next term of Court.

DATED in Helena, Montana, this 31st day of July, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Steve Fletcher
Ms. Susan C. Witte
Submitted: June 23, 1998

1. ARM 24.29.720 was amended in 1995 but the amendment does not affect the pay at issue herein. The 1992 version of the rule is quoted above.

2. Since the saw rental was based on a percentage, it does not appear to satisfy ARM 24.29.720(1)(c), which provides that excludable employee expenses cannot be based on a percentage of wages. However, the parties have not argued this point and I do not address it further.