IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 25

WCC No. 2000-0207

DEBRA STAVENJORD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PRAIRIE NEST RANCH

Employer.

DECISION AND JUDGMENT

AFFIRMED 4/1/03

Summary: Claimant urges that the failure of the Occupational Disease Act (ODA) to provide permanent partial disability (PPD) benefits equivalent to those available under the Workers' Compensation Act (WCA) violates her equal protection rights. If her claim arose under the WCA she would be entitled to $27,027 in PPD benefits, § 39-71-703, MCA, whereas under the ODA the maximum she can recover is $10,000. § 39-72-405, MCA (1997).

Held: Under *Henry v. State Compensation Insurance Fund,* 1999 MT 126, the $10,000 limitation is unconstitutional and claimant is entitled to the same benefits she would receive if her condition arose under the WCA.

Topics:

> **Constitutional Law: Equal Protection.** *Henry v. State Compensation Ins. Fund,* 1999 MT 126, held that there is "**no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts.**" The holding is comprehensive and unequivocal. It precludes paying claimants whose conditions arise under the Occupational Disease Act less than they would receive under the Workers' Compensation Act.

Occupational Law: Equal Protection. *Henry v. State Compensation Ins. Fund,* 1999 MT 126, held that there is "**no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts.**" The holding is comprehensive and unequivocal. It precludes paying claimants whose conditions arise under the Occupational Disease Act less than they would receive under the Workers' Compensation Act.

¶1 The issue in this case is whether the failure of the 1997 version of the Montana ODA to provide PPD benefits equivalent to the benefits provided in the Montana WCA violates the claimant's right to equal protection of the law.

¶2 The facts are agreed (Agreed Facts filed January 23, 2001). Those facts are as follows:

¶2A That on April 1, 1998, petitioner suffered an occupational disease arising out of and in the course of her employment with Prairie Nest Ranch in Cascade County, Montana.

¶2B Petitioner was originally diagnosed with epicondylitis of both elbows, she had surgery on both elbows, and she also had a cervical disc removal surgery.

¶2C At the time of the injury, petitioner's employer was enrolled under Compensation Plan III of the Workers' Compensation Act and its insurer is the State Compensation Insurance Fund.

¶2D The petitioner has reached maximum medical improvement ("MMI"), and she has a 12% whole person impairment rating.

¶2E The petitioner's lifting ability has been diminished, because of her condition. Before the injury the petitioner worked in the "heavy" category, but now is only able to work in the "light" category.

¶2F The petitioner has sustained a wage loss of greater than $2.00 per hour as defined by the Montana Workers' Compensation Act.

¶2G The petitioner's permanent partial disability rate under the Montana Workers' Compensation Act would be $198.00 per week.

¶2H If the petitioner's PPD entitlement was calculated pursuant to §39-71-703, MCA (1997), of the Montana Workers' Compensation Act, the petitioner's PPD entitlement would be as follows:

Impairment	12%
Age (45 DOB 12/9/52)	1%
Education (11th grade)	1%
Lifting Restrictions (Heavy to light)	5%

Wage Loss (more than $2 per hour)	20%
Total	39%

In monetary terms, these PPD benefits equal 39% x 350 weeks = 136.5 weeks x $198.00 per week = $27,027.00.

¶2I If the petitioner's PPD entitlement is calculated pursuant to §39-72-405(2), MCA (1997) of the Montana Occupational Disease Act, then her maximum PPD entitlement would be $10,000.00.

Discussion

¶3 As set forth in the statement of facts, the ODA provides a maximum of $10,000 in benefits to claimants who are permanently disabled but not permanently totally disabled, in other words, to claimants who are permanently partially disabled. For the same disability, the WCA would provide the claimant in this case with $27,027 in PPD benefits, which is nearly three times greater than the maximum benefits allowed under the ODA. Thus, clearly as applied to this case, the ODA provides less favorable benefits to the claimant than to an identically situated claimant whose condition arose as a result of an injury on a single day of work.

¶4 In *Eastman v. Atlantic Richfield Co.* 237 Mont. 332, 777 P.2d 862 (1989), the Montana Supreme Court held that the ODA's $10,000 limitation of benefits to permanently partially disabled claimants does not violate equal protection guarantees notwithstanding the more liberal benefits available under the WCA. The analysis in *Eastman* was as follows:

> Historically workers' compensation was enacted to compensate victims of industrial accidents and injuries. It was not set up to respond to workers suffering occupational disease. That distinction was partially explained by the common law historical background which had allowed tort suits for injuries but generally had shown that the negligence of an employer was not a basis for a common law action. As stated in 1B Larson, Workmen's Compensation Law, Section 41.20 (1987):
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> > To the extent that compensation acts were thought of as substituting nonfault liability for the kind of injuries that were potential subjects of fault liability, there was thought to be no place for occupational diseases, which (in the sense of a disease due to the "normal" conditions of the industry as distinguished from the negligence of the employer) had consistently been held incapable of supporting a common-law action.
> >
> > As the incidence of devastating diseases of the work place increased, legislatures concluded that some system of compensation was needed. Gradually the law was expanded to provide benefits for the victims of

> occupational disease, notably silicosis and asbestosis. 32 Labor Law Journal (1981), 212, 213.

237 Mont. at 338-39, 777 P.2d at 866.

¶5 As set forth in the discussion in *Eastman, the* rationale for distinguishing between claimants suffering from occupational diseases and those suffering from industrial injuries is based on the fact that historically the common law allowed tort suits for injuries based on employer negligence. Similar employer liability did not exist in cases of occupational disease. Thus, the quid pro quo with respect to workers' compensation injuries -- which was the exchange of no-fault benefits for the right to sue the employer -- did not apply to occupational disease benefits.

¶6 In *Henry v. State Compensation Insurance Fund,* 1999 MT 126, 294 Mont. 449, 982 P.2d 456 (1999), the Montana Supreme Court held that "the historical justification for treating workers differently under the WCA and the ODA no longer exists. Indeed, the entire underpinnings of *Eastman* have evaporated, rendering its continued validity questionable." That case (*Henry*) involved a claim for rehabilitation benefits. Those benefits arise under the WCA but are not available under the ODA. The claimant, who suffered an occupational disease, challenged the failure on equal protection grounds and the Supreme Court sustained his challenge.

¶7 The Supreme Court initially distinguished *Eastman* on the ground that the statute challenged in *Henry* involved "the wholesale denial of the same benefits to another similarly situated group," whereas *Eastman* had involved a mere difference in the degree of benefits available under the two acts. The *Henry* Court's subsequent analysis, however, makes it impossible to limit its decision to denials of benefits. The Court goes on to say:

> ¶ 43 . . . Eastman filed his claim for compensation benefits in 1985, prior to the 1987 amendments to the WCA and the ODA. As pointed out earlier, after the 1987 amendments to the WCA and the ODA, the definitions of "injury" and "occupational disease" no longer focus on the nature of the medical condition, but rather focus on the number of work shifts over which the worker incurs an injury. Thus the historical justification for treating workers differently under the WCA and the ODA no longer exists. Indeed, the entire underpinnings of *Eastman* have evaporated, rendering its continued validity questionable.
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> ¶ 44 **In sum, we can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts.** Simply put, a herniated disc is a herniated disc. Rehabilitation benefits promote the policy of early return to work for both classes of workers. [Emphasis added.]

295 Mont. at 459-60. The bolded language is comprehensive and unequivocal. I am bound by it. I cannot qualify or limit it.

¶8 I conclude that the failure of the legislature to provide as generous benefits to claimant under the ODA as she would receive if her condition arose under the WCA violates claimant's right to equal protection of the laws. She is therefore entitled to PPD benefits calculated in accordance with the WCA.

JUDGMENT

¶9 Where PPD benefits calculated pursuant to the WCA are greater than the benefits available a claimant under the ODA, constitutional equal protection guarantees require that benefits be computed and paid in accordance with the WCA.

¶10 The claimant in this case is entitled to PPD benefits in the sum of $27,027, which the insurer shall pay.

¶11 This Decision and Judgment is otherwise certified as final for purposes of appeal. ARM 24.5.348.

¶12 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 22nd day of May, 2001.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Thomas J. Murphy
Mr. David A. Hawkins
Submitted: February 23, 2001