

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 58

WCC No. 9312-6958

ROGER WIMBERLEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

SUPER 1 FOODS

Employer.

ORDER DENYING PETITION FOR NEW TRIAL OR AMENDMENT

The petitioner has moved to amend the Court's Order Granting Summary Judgment. The motion is based on the petitioner's assertion that the Court overlooked facts concerning when the State Fund received claimant's impairment rating and when claimant was first informed of the rating. The motion is **denied**.

Summary judgment was granted based on the pleadings. Neither party submitted affidavits, depositions or written discovery.⁽¹⁾ The Court will not consider representations in briefs or unauthenticated exhibits as a basis for summary judgment, and a party opposing summary judgment is under no obligation to present counter-evidence concerning such unsworn representations and exhibits. See Rule 56(e), Mont. R. Civ. P. Thus, the only basis upon which the Court could, and did, render its decision was the facts pleaded in the Petition for Trial and admitted by the Response to Petition.

The dates on which the State Fund and the claimant learned of the impairment rating were deemed immaterial to the Court's decision. As stated in the Order Granting Summary Judgment, claimant's right to the impairment award was a qualified one in the first place since there is an express provision rendering incarcerated prisoners ineligible for disability benefits. § 39-71-744, MCA. We assumed claimant's assertions about a lack of timely notice to be true, but deemed them immaterial to the disposition of the Petition. Whether or not claimant might have elected a lump sum, and whether or not the State Fund could have then sought to recoup that portion which might be attributable to the period of claimant's incarceration, the Court cannot award benefits which are precluded by statute.

In his Reply Brief in Support of Petition for New Trial, claimant also raises for the first time a constitutional challenge to section 39-71-744, MCA. The challenge is belated and will not be considered here.

IT IS HEREBY ORDERED that the Petition for New Trial or Amendment to Summary Judgment for Insurer is **denied**.

DATED in Helena, Montana, this 23rd day of June, 1994.

(SEAL)

/s/ MIKE McCARTER

JUDGE

c: Mr. William P. Joyce

Ms. Ann E. Clark

1. After summary judgment was granted claimant submitted an affidavit. The affidavit is untimely and will not be considered here.